



**DOES INTERNATIONAL LAW PROSCRIBE
COUPS D'ÉTAT? AFRICA'S ROLE IN THE
DEVELOPMENT OF THE PROSCRIPTION**

BY

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1435294

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Word count:		21035	No. of pages 77

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DEDICATION

To my father,

Aviton Robert Ramasiya Mahove Ruwital

(07/08/1961 – 24/10/1998)

REST IN PEACE BABA.

ACKNOWLEDGEMENTS

I am deeply indebted to the various lecturers who taught me for the duration of my LLB and LLM studies at the University of Cape Town.

My supervisor, Dr Cathleen Powell. I appreciate your unwavering patience, support and guidance.

My colleagues and friends. Thank you for being there when I needed you most.

My mother, Ms Lydia Tholanah-Ruwitah, and my family. Thank you for everything. I LOVE YOU.

ABSTRACT

Coups d'état have occurred around the world since time immemorial but have been more commonplace amongst African states. They have typically yielded bloodshed and instability and, they inevitably culminate in the gross violation of the most basic human rights. They also arguably constitute a perennial threat in the politics of African states and, they have been condemned in numerous instances. Such condemnation brings to the fore, questions as to international law's position on *coups d'état*. In light of International law placing a high premium on the doctrine of national sovereignty, it is tempting to conclude that *coups d'état* are beyond the scope of international law thus not being proscribed. This position is further strengthened by the absence of international treaties/conventions proscribing *coups d'état*. It can, however, be argued that the recognition given to the notion of democracy by some treaties/conventions such as the UDHR, CEDAW, and ICCPR, may amount to an implicit proscription of *coups d'état* under international law. There is also, a right to democracy, along with a proscription of *coups d'état* under customary international law as reflected by state practice. African states, being specially affected by the scourge of *coups d'état*, have played a leading role in the development of the customary international law proscription of *coups d'état*. Regardless of it being difficult for state responsibility to ensue, *coups d'état* constitute wrongful acts at international law.

ABBREVIATIONS

ACDEG	African Charter on Democracy, Elections and Good Governance
AU	African Union
AUCA	African Union Constitutive Act
CAR	Central African Republic
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CIL	Customary International Law
ECOWAS	Economic Community of West African States
ICCPR	International Convention on Civil and Political Rights
ICJ	International Court of Justice
ILC	International Law Commission
OAU	Organisation for African Unity
SADC	Southern African Development Community
SAS	Specially Affected States
SCRD	Supreme Council for the Restoration of Democracy
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
USA	United States of America
Vienna Convention	Vienna Convention on the Law of Treaties

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CHAPTER 1: INTRODUCTION AND BACKGROUND

I. INTRODUCTION

Coups d'état have occurred around the world since time immemorial. In recent times, however, they appear to have been more commonplace amongst African states than elsewhere. Arguably, *coups d'état* constitute a perennial threat in the politics of African states. These *coups d'état* have yielded varying consequences, such as massive bloodshed and instability in their respective states. They have also aroused a myriad of reactions such as condemnation, along with the imposition of economic sanctions on the international spectrum. This brings to the fore questions as to the international law position in that regard. Oftentimes, international law is perceived as an extremely contentious body of law. Consequently, the content, place and function of numerous concepts in international law remain unsettled and warrant perpetual debate. Such concepts include democracy and that of national sovereignty, among others.

It is, therefore, no surprise that Bennet and Strugg characterise 'sovereignty' as a fluid concept depending on context and hold the position that the discussion as to the characteristics of a sovereign state is not settled.¹ Schriver, however, narrows down the central tenet of national sovereignty as being that of a state having ultimate dominion over its own affairs.²

Due to the high premium placed on the sovereignty of states, international law traditionally perceived the internal form of government of states as solely and exclusively falling within the respective states' jurisdiction.³ An exception to this would be where a state intentionally and expressly abnegates its dominion.⁴

With sovereignty being a key precept of statehood⁵ and states as the primary subjects of international law,⁶ it follows that the sovereignty of states is the cornerstone of the international law regime. Further, state sovereignty arguably dictates that the internal affairs of states are sacrosanct and ought to be free from external interference. This would include the

¹ Tom W Bennet and Jonathan Strugg 'Introduction to International Law' (2013) at 47.

² Nico Schrijver 'The Changing Nature of State Sovereignty' (2000) at 71.

³ Gerard Kreijen (ed) 'State, Sovereignty, and International Governance' (2002) at 6.

⁴ Stephen D Krasner 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) at 1077.

⁵ S B M Marume, R R Jubenkanda, C W Namusi and N C Madziyire 'An analysis of essential elements of the State' (2016) 5 *International Journal of Engineering Science Invention* 3 at 24.

⁶ Tom W Bennet and Jonathan Strugg 'Introduction to International Law' (2013) at 57.

form of transition from one government to another and the transfer of power thereof, among other things. In that background, this research is aimed at examining whether international law proscribes *coups d'état* and, if Africa has played a role in the development of such a proscription.

II. RESEARCH QUESTIONS

In order to answer the central question on the legality of *coups d'état* vis-à-vis international law, this research will examine the following questions:

- 1) What are the effects of *coups d'état*?
- 2) Has Africa experienced a disproportionately higher number of *coups d'état* globally and, what are the causes of such *coups d'état* in Africa?
- 3) Does Africa remain susceptible to *coups d'état*?
- 4) What are the International Law norms on *coups d'état* and do *coups d'état* constitute wrongful acts at international law?
- 5) Is democratic governance a right under international law?

III. SOURCES AND METHODOLOGY

In approaching this research, a library and desk-based methodology was used, and all the information relied on by this dissertation was obtained without any fieldwork. The research builds on existing literature on *coups d'état* and democracy among other subjects and, it incorporates a blend of published and unpublished work. While it builds on both primary and secondary sources, this research mainly relies on secondary sources. Among others, the primary sources consulted and analyzed include treaties, conventions, and charters such as the United Nations Charter⁷, the African Union Constitutive Act⁸ and the African Union Charter on Democracy, Elections and Governance⁹. The secondary sources incorporated herein are mainly in the form of applicable textbooks, papers and journal articles authored by a variety of scholars, among other material.

⁷ United Nations, Charter of the United Nations, 24 October 1945.

⁸ Organisation of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000.

⁹ African Union, *African Charter on Democracy, Elections and Governance*, 30 July 2007.

IV. LIMITATIONS

There is very limited academic writing on the interplay between *coups d'état* and the international legal framework. There is, therefore, a limited range of academic literature on which certain sections of this research rely. This dissertation thus uses non-academic sources in some instances. Owing to the library and desk-based methodology employed in this research, some sections of this dissertation largely rely on secondary data. This has potential implications on the aptness, accuracy and reliability of some of the data, among other things. The research will however make use of datasets compiled by renowned and credible researchers and research units respectively. It is also not possible, for the purposes of this research, to consider every single instance of a *coup d'état* on the African continent. A purposive sampling technique will therefore be employed. This potentially exposes sections of this research to researcher bias. This research will however try to widen the sample base as far as possible while also comparing the findings thereof with those of other scholars and researchers.

V. CHAPTER OVERVIEW

Chapter 1: Background and Introduction

Apart from introducing the research, the first chapter serves as an overview of the dissertation and the concepts being dealt with herein. It also highlights the research questions, aim of the study, the research methodology employed, the shortcomings of the methodology and, the nature of the sources relied on. It ultimately provides a detailed structure and roadmap of the dissertation.

Chapter 2: The notion of a *coup d'état*

The second chapter unpacks *coups d'état* holistically. It adopts a working definition and briefly unpacks the concept of a revolution. The intention is to clearly distinguish the character of revolutions from that of *coups d'état*. It also ultimately seeks to generally examine the impact and effects of *coups d'état* on the respective states. In doing so, it considers the idea of a 'democratic *coup d'état*' and the interplay between *coup d'état* and human rights.

Chapter 3: *Coups d'état* and Africa

The third chapter examines the trends regarding *coups d'état* and tracks the distribution of this phenomenon across the world. This chapter seeks to test the veracity of the claim that Africa

has experienced a disproportionately higher number of *coups d'état* globally and, it also briefly explains the distribution of *coups d'état* across the continent. It ultimately briefly considers the causes of *coups d'état* in Africa.

Chapter 4: The international law on *coups d'état*

The fourth chapter probes the international law norms on *coups d'état*. This shall be considered from an international, continental, and regional standpoint. The chapter also considers the Specially Affected States doctrine and the extent, if any, that it can be useful in establishing the international law norms on *coups d'état*. This stems from the research's focus towards Africa, coupled with the claim that Africa has disproportionately experienced more *coups d'état* than elsewhere in the world. The chapter also assesses whether *coups d'état* amount to wrongful acts at international law and whether democracy is a right under international law.

Chapter 5: Conclusion and Recommendations

The fifth chapter serves as the final and concluding chapter of the dissertation. It collates the findings of each of the previous chapters. This chapter also provides certain recommendations based on earlier findings.

CHAPTER 2: THE NOTION OF A *COUP D'ÉTAT*

I. INTRODUCTION

This chapter lays the foundation of the study on *coups d'état*. The chapter shall unpack the notion of *coups d'état* holistically. This shall be achieved by adopting a working definition of a *coup d'état*. While acknowledging the similarities between the two, for purposes of clarity, the chapter shall distinguish *coups d'état* from revolutions. It shall also consider the general effect of *coups d'état* and the idea of a 'democratic *coup d'état*'. The chapter ultimately considers the interplay between *coups d'état* and human rights and the implications thereof. It argues that *coups d'état* inevitably culminate in the gross violations of the most basic human rights. In dissecting all these concepts, the chapter makes reference to African examples of *coups d'état*.

II. THE NOTION OF A *COUP D'ÉTAT*

Within French etymology, the word 'coup' denotes a sudden 'blow or stroke'¹. The notion of *coups d'état* has generated several scholarly definitions over time. This research, however, relies on the description of Luttwak (1969). Luttwak explains that a *coup d'état* 'consists of the infiltration of a small but critical segment of the state apparatus, which is then used to displace the government from its control of the remainder'.² This is typically carried out by 'the military or other elites within the state apparatus'³ hence being commonly referred to as 'military coups'. The military officers in some instances then go on to form the next government or, install a civilian government heavily backed by them, usually maintaining their control and influence in the establishment vicariously. Coups are often referred to as either bloody or bloodless with the former characterised by violent means and fatalities,⁴ while in terms of the latter, only the threat of use of force is employed as the means to seize power.⁵ The most

¹ Oxford Colour French Dictionary Plus (3rd ed.), New York: Oxford University Press Inc.

² Edward Luttwak *Coup d'État: A Practical Handbook* (1969) 172.

³ Nhlalo Ndaba 'Army trucks in Harare spark panic; military insiders urge calm' *Times LIVE* 14 November 2017, available at <https://www.timeslive.co.za/news/africa/2017-11-14-army-trucks-in-harare-spark-panic-military-insiders-urge-calm/>, accessed on 14 September 2019.

⁴ Luttwak op cit note 2.

⁵ Fundikila Wazambi 'Military *Coup D'État* against Democratically Elected Governments in Africa and International Law: The Recent Cases of Mali and Egypt' (2015) 9.

prominent examples of bloody and bloodless coups respectively would be the Nigerian coup (and counter-coup) of 1966, and Mauritanian coup of 2005 or the Zimbabwean Coup of 2017, all of which are briefly described below.

a) The Nigerian, Mauritanian, and Zimbabwean *Coups D'état*

On the 15th of January in 1966, a cabal of young military officers toppled Nigeria's democratically elected government through a violent military coup to curb 'corruption and ethnic rivalry'.⁶ Six months later, Nigeria experienced yet another exceedingly violent military coup. With multiple fatalities and several displacements recorded,⁷ the Nigerian coups of 1966 are often classified among Africa's bloodiest coups to date.

This is in sharp contrast to the Mauritanian coup of August 2005, where a cabal of military officers, seeking an end to 'totalitarian practices' and stating that they would govern for just two years, toppled President Maaouiya Ould Taya, who had himself ascended to presidency two decades prior via a military coup.⁸ Although many people were reported to have fled the capital, no casualties were recorded and the transition was reported as having been 'bloodless'.⁹

In a similar fashion, on the 14th of November 2017, some officers of the Zimbabwe Defence forces seized control of the national broadcaster and effectively put President Robert Mugabe and certain key members of his administration under house arrest.¹⁰ This was followed by heavy military presence in the capital¹¹ and a nationally syndicated broadcast by the military officers stating that the events taking place were not a coup; rather, the military was targeting 'criminals around the president' who were responsible for the apparent socio-economic collapse within the country, and insisting that the situation would 'return to normalcy' upon them achieving their goal.¹² Coupled with other factors, these events consequently resulted in

⁶ Max Siollun 'How first coup still haunts Nigeria 50 years on' *BBC News* 15 January 2016, available at <https://www.bbc.com/news/world-africa-35312370>, accessed on 19 September 2019.

⁷ Ibid.

⁸ 'Bloodless coup in Mauritania' *News 24* 3 August 2005, available at <https://www.news24.com/Africa/News/Bloodless-coup-in-Mauritania-20050803>, accessed on 19 September 2019.

⁹ Ibid.

¹⁰ 'Zimbabwe's Mugabe 'under house arrest' after army takeover' *BBC News* 15 November 2017, available at <https://www.bbc.com/news/world-africa-41997982>, accessed on 19 September 2019.

¹¹ Op cit note 5 at 11. A mass uprising in the wave of the Arab spring, later on reinforced by the Egyptian Military ultimately culminated in the removal of President Morsi from presidency.

¹² Op cit note 10. Also see 'Zimbabwe Military Maj. Gen. S.B. Moyo After Seizing State TV: 'Not A Military Takeover' *NBC News* 15 November 2017 available at <https://www.youtube.com/watch?v=63NQvtB435I>, accessed on 14 September 2019.

President Mugabe's resignation from office¹³ along with the arrests and exile of certain key members of his government. A new administration heavily backed by and including certain military protagonists subsequently took over. This operation was also widely reported to have been peaceful and bloodless¹⁴ and, the threat of the use of force, among other factors, effected regime change.

b) Forms of *Coups d'état*

It is trite to note that coup events take different forms, such as successful coups and failed coups among others.¹⁵ As is the case in some examples referred to above, successful coups typically culminate in either effective regime change, mere replacement of the incumbent or, arguably, even democratization, while in terms of the latter, the operation is thwarted, hence not effecting any change.¹⁶ The most recent failed coups include the Gabonese¹⁷ and Ethiopian¹⁸ attempts of January and June 2019 respectively. Largely, however, the thrust of this research is on 'successful *coups d'état*', being the ones that culminate in a transfer of governmental power.

c) Revolutions

Other than regular and democratic elections, military coups and revolutions have historically been common methods resulting in the change of or in governments. World history is replete with instances of both *coups d'état* and revolutions and, the divide between the two phenomena has in some instances, become obscured. In turn, this has constantly triggered debates as to whether certain events match the profile of revolutions or *coups d'état* instead as was the case with the deposition of Egypt's President Mohamed Morsi in 2011.¹⁹ Like that of the *coup d'état*, the concise definition of what counts as a revolution remains contested. This research, however, adopts the definition which states that revolutions are 'irregular, extraconstitutional,

¹³ Peta Thornycroft, Roland Oliphant & Louise Burke 'Zimbabwe's president Robert Mugabe finally resigns, sparking wild jubilation on the streets of Harare' *The Telegraph* 21 November 2017, available at <https://www.telegraph.co.uk/news/2017/11/21/zimbabwes-president-robert-mugabe-has-resigned-speaker-says/>, accessed on 14 September 2019.

¹⁴ John Campbell 'Military Coup in Zimbabwe Remains Bloodless' *Council on Foreign Relations* 15 November 2017, available at <https://www.cfr.org/blog/military-coup-zimbabwe-remains-bloodless>, available on 14 September 2019.

¹⁵ Monty G. Marshall and Donna Ramsey Marshall 'Coups d'état Events, 1946-2017 Codebook' (2018) *Center for Systemic Peace* at 1.

¹⁶ Jonathan Powell 'Determinants of the Attempting and Outcome of Coups d'état' (2012) 6 *The Journal of Conflict Resolution* 46.

¹⁷ 'Gabon coup attempt: What happened?' *BBC News* 7 January 2019, available at <https://www.bbc.com/news/av/world-africa-46785012/gabon-coup-attempt-what-happened>, accessed on 18 September 2019.

¹⁸ 'Dozens killed in foiled Ethiopia coup attempt, authorities say' *France 24* 26 June 2019, available at <https://www.france24.com/en/20190626-dozens-killed-foiled-ethiopia-coup-attempt-authorities-say-abi-ahmed-amhara>, accessed on 18 September 2019.

¹⁹ Wazambi op cit note 5 at 11.

and sometimes violent changes of political regimes and control of state power brought about by popular movements'²⁰. Owing to the grey areas between coups and revolutions, it is therefore key to distinguish the two from each other for the purposes of this research.

d) Coup versus Revolution

Coups and revolutions share the commonality of being irregular forms of change of government. They do however possess a few contrasts. *Coups d'état* are elite in nature, with a small group of powerful people, typically military officers, leading the operation.²¹ This sharply differs from revolutions, which are heavily characterised by grassroots involvement and mass mobilisation.²² Some coups do however enjoy mass support, while some revolutions have been reinforced, or even hijacked by, the military.²³ Coups also typically target the leadership, ultimately toppling a government and installing a new one.²⁴

Revolutions are however more nuanced and often culminate into paradigm political and socio-economic transformation.²⁵ Whereas revolutions are often punctuated by mass mobilization and protests for extended periods, coups are typically sudden.²⁶ Arguably, revolutions are typically marred by chaos, violence or serious bloodshed, while coups are not always characterised by political and/or economic turmoil.²⁷

III. EFFECTS OF *COUPS D'ÉTAT*

Coups d'état are by nature, unconstitutional, and, characterised by the derogation of democratic processes.²⁸ While some coups are bloodless, the immediate and long-term effects of *coups d'état* generally can be confined to the violence, bloodshed and displacement.²⁹ This brings the issue of human rights into the fray. *Coups d'état* ultimately culminate in the immediate transition in a country's leadership, often directly into the hands of the military. Military rule is typically authoritarian and corrupt and historically, military governments have not performed

²⁰ Jeff Goodwin *No Other Way Out STATE AND REVOLUTIONARY MOVEMENTS 1945-1991* (2001) 9.

²¹ Wazambi op cit note 5 at 9.

²² Goodwin op cit note 20.

²³ Ibid.

²⁴ Raymond Tanter and Manus Midlarsky 'A Theory of Revolution' (1967) 3 *Journal of Conflict Resolution* 11 at 265.

²⁵ Goodwin op cit note 20.

²⁶ Peter Siani-Davies 'The Romanian Revolution of December 1989' (2007) at 268.

²⁷ Tanter and Midlarsky op cit note 24.

²⁸ Mohammed M Uddin 'Distinguishing Legality and Legitimacy of *Coup d'état*: Looking Beyond Kelsen' 3 *International Journal of Law and Legal Jurisprudence Studies* 4 at 1.

²⁹ Edward Luttwak *Coup d'État: A Practical Handbook* (1969) 172.

better than elected, civilian governments in Africa.³⁰ Military governments in Africa have typically failed to forge political order,³¹ perpetuating instability which in turn has far-reaching implications on spheres such as the economy and human rights.

As evidenced by, among other things, the United Nations General Assembly (UNGA) and the United Nations Security Council (UNSC) resolutions against *coups d'état* highlighted in the 4th Chapter, *coups d'état* are widely deemed to be undemocratic, hence their condemnation from time to time. As such, *coups d'état* have been described as a perpetual threat against budding democracies.³² Scholarship has emerged suggesting that *coups d'état* are not always negative phenomena. Some *coups d'état* have been referred to as 'democratic'/'good' *coups d'état*.

IV. THE DEMOCRATIC *COUP D'ÉTAT*

A common argument is that while *coups d'état* are generally deemed to possess autocratic overtones, some coups, in fact, usher in and perpetuate democracy.³³ This is because such coups are typically carried out in response to widespread contestation of autocratic regimes.³⁴ Such autocratic regimes typically refuse to relinquish power following such contestation and are subsequently toppled by an often well-respected military via such *coups d'état*. The military ultimately facilitates constitutional processes like credible elections within a short timespan thereby ushering in democratic change, with the military sometimes constituting a caretaker government pending a democratic transition.³⁵ Varol refers to this as 'The Democratic *Coup d'état*'. In terms of this framework, a coup against a non-autocratic regime cannot, therefore, match the profile of a 'democratic *coup d'état*'.³⁶ Following from this, most *coups d'état* do not fall under the bracket of 'democratic *coups d'état*' as they are typically carried out against democratically elected governments and give birth to autocratic regimes. In that light, Varol acknowledges that 'democratic *Coups d'état*' thus constitute an exception to the norm.³⁷

³⁰ Patrick J McGowan 'African Military *coups d'état*, 1956-2001: Frequency, Trends and Distribution' (2003) 41 *Journal of Modern African Studies* 3 at 340.

³¹ *Ibid.*

³² Mohammed M Uddin 'Distinguishing Legality and Legitimacy of *Coup d'État*: Looking Beyond Kelsen' 3 *International Journal of Law and Legal Jurisprudence Studies* 4 at 1.

³³ Ozan O. Varol 'The Democratic *Coup d'État*' (2017) 53 *Harvard International Law Journal* at 299.

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid* at 295.

Examples of *coups d'état* deemed to be 'democratic' include Mali³⁸ in 1991 and Guinea-Bissau³⁹ in 2003. A more prominent example is the Nigerien coup⁴⁰ of 2010 where President Mamadou Tandja was toppled by the military after having dissolved parliament and passed a referendum effectively extending his tenure as president by an additional three (3) years.⁴¹ The coup leaders then went on to establish a Supreme Council for the Restoration of Democracy (SCRD) to govern, and to 'make Niger an example of democracy and good governance.'⁴² This was widely accepted by the citizens while the opposition parties touted this as a chance to revive democracy.⁴³

a) The Egyptian Democratic *Coup D'état*

A more recent example to illustrate Varol's idea of a 'democratic *coup d'état*' is the Egyptian *Coup d'état* of 2011 which culminated into the deposition of President Hosni Mubarak. The actions of the military were preceded by nearly a month of widespread demonstrations and civil resistance by multitudes of Egyptians, highlighting several grievances and demanding an end to years of autocracy and calling for the removal of the 'highly corrupt and autocratic' Mubarak administration, while also calling for it to be replaced by a democratic government.⁴⁴ With the backing of the masses, the Egyptian Military then seized power, igniting widespread celebrations in Egypt and beyond.⁴⁵

This was followed by an announcement of the suspension of the constitution and the dissolution of parliament, along with the formation of a transitional government for a six-month period leading to elections.⁴⁶ During this period, political parties and organisations were allowed to organize themselves freely and to participate in the series of widely popular elections that followed, with the exception of President Mubarak's National Democratic Party

³⁸ 'Mali's Dictator Is Overthrown in Coup' *The New York Times* 27 March 1991, available at <https://www.nytimes.com/1991/03/27/world/mali-s-dictator-is-overthrown-in-coup.html>, accessed on 6 January 2020.

³⁹ 'Guinea Bissau Military Stages Bloodless Coup' *VOA News* 14 September 2003, available at <https://www.voanews.com/archive/guinea-bissau-military-stages-bloodless-coup-2003-09-14>, accessed on 6 January 2019.

⁴⁰ 'Military junta seizes power in Niger coup' *The Guardian* 19 February 2019, available at <https://www.theguardian.com/world/2010/feb/19/niger-military-junta-coup>, accessed on 7 January 2020.

⁴¹ George Derpanopoulos, Erica Frantz and Barbara Geddes 'Are coups good for democracy?' (2016) *Research at Politics* at 1.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ Varol op cit note 33 at 292.

⁴⁵ *Ibid.*

⁴⁶ *Ibid* at 293.

which was dissolved by an Egyptian superior court for ‘monopolizing power’ and electoral fraud, among other things.⁴⁷ This election cycle was highly characterized by the triumph of the Muslim Brotherhood and the election of Mohamed Morsi as president.⁴⁸

The Morsi government, however, faced criticism for effectively shrinking the newly opened democratic space. This was characterised by attempts by president Morsi to influence the adoption of a Muslim leaning constitution by issuing a presidential decree elevating presidential pronouncements above judicial review.⁴⁹ Such attempts went on to trigger mass protests ultimately resulting in his deposition also via yet another *coup d’état*.⁵⁰ It can be argued the Egyptian *coup d’état* of 2011 did, in fact, tick all the boxes thus amounting to a ‘democratic coup d’état’ as it was topped off by elections widely deemed to be democratic. Events of this sort are, however, exceptions rather than norms and, *coups d’état* are actually not systematically linked with democratization.⁵¹ Rather, *coups d’état* typically oust dictators and replace them with new ones.⁵² It should however be noted that credible elections are a cornerstone of democracy,⁵³ thus *coups d’état* are by nature non-democratic even though they may potentially end dictatorships while ushering in democracy.

Under the transitional government in the aftermath of the Mubarak presidency, numerous reports of abuses including attacks and deaths of protestors who challenged alleged attempts by the interim government to consolidate and maintain its grip on power.⁵⁴ This placed yet another dent on the transition and it brings to the fore the question as to whether *coups d’état* set the stage for other infractions of international law.

⁴⁷ Ibid at 305.

⁴⁸ David Kirkpatrick ‘Named Egypt’s Winner, Islamist Makes History’ *The New York Times* 24 June 2012, available at <https://www.nytimes.com/2012/06/25/world/middleeast/mohamed-morsi-of-muslim-brotherhood-declared-as-egypts-president.html>, accessed on 7 January 2020.

⁴⁹ David Kirkpatrick and Mayy El Sheikh ‘Citing Deadlock, Egypt’s Leader Seizes New Power and Plans Mubarak Retrial’ *The New York Times* 22 November 2012, available at <https://www.nytimes.com/2012/11/23/world/middleeast/egypts-president-morsi-gives-himself-new-powers.html>, accessed on 7 January 2020.

⁵⁰ ‘President Morsi overthrown in Egypt’ *Aljazeera News* 4 July 2013, available at <https://www.aljazeera.com/news/middleeast/2013/07/20137319828176718.html>, accessed on 7 January 2010.

⁵¹ Varol op cit note 33 at 295.

⁵² Ibid.

⁵³ Ibid at 299.

⁵⁴ ‘Egypt Protests: Death Toll up in Cairo’s Tahrir Square’ *BBC News* 20 November 2011, available at <http://www.bbc.co.uk/news/world-africa-15809739>, accessed on 13 October 2019.

b) *Coups d'état* and Human rights

Human rights have since become widely recognised as falling under international law and therefore cannot be curtailed in the name of state sovereignty.⁵⁵ In light of this, certain human rights norms have evolved into customary international human rights law.⁵⁶ Democratic and competitive elections are often considered as being correlated to progressive human rights conditions,⁵⁷ while *coups d'état* are deemed to antagonize democratic processes. There is typically an inverse relationship between human rights and the proliferation of militarism in Africa.⁵⁸

Historically, coup regimes have often carried terrible human rights records be it during their seizure of governmental power or during their incumbency.⁵⁹ The wide-ranging idea of 'human rights violations' is broadly characterised by the infraction of rights relating to physical integrity, socioeconomic and cultural rights⁶⁰ among other rights. *Coups d'état* are however typically associated with infringements relating to, but not limited to, bodily integrity, freedom of speech, free political participation, and justice. Coup regimes often perpetrate such violations as means to seize governmental power and/or ultimately sustain it. Such violations provide a strong justification for the proscription of *coups d'état* under international law as international law increasingly places a high premium on human rights.⁶¹

(i) *Physical Integrity Rights*

At the top of human rights violations are those relating to bodily integrity. In the context of *coups d'état*, these are typically violations in terms of which the state, using its coercive machinery, arbitrarily infringes on the civilians' physical integrity.⁶² Such infringements often take place in the form of state-sponsored attacks and violence, enforced disappearances, political incarceration, torture and extrajudicial killings among other things.⁶³ Violations relating to bodily integrity are arguably the most prominent forms of human rights violations whether in coup situations or beyond.

⁵⁵ Ibid at 66.

⁵⁶ Tunguru Hauraka 'The Effects of Military *Coups d'Etat* and Regimes on Human Rights in Africa' (1988) 26 *Archiv des Völkerrechts* 1 at 65.

⁵⁷ Tom J Farer 'Elections, Democracy, and Human Rights: Toward Union' (1989) 11 *Human Rights Quarterly* 4 at 508.

⁵⁸ Hauraka 'op cit note 56 at 49-50.

⁵⁹ Ibid at 51.

⁶⁰ Travis Benjamin Curtice and Daniel Amon 'Coups and Human Rights' (2017) *Conference Paper* at 6.

⁶¹ Anthony D'Amato 'The Concept of Human Rights in International Law' (1892) 82 *Columbia Law Review* 6 at 1110.

⁶² Curtice and Amon op cit note 60 at 6.

⁶³ Ibid at 7.

As alluded to above, the Egyptian *coup d'état* of 2011, although being deemed to have been 'good' or 'democratic', was also marred by reports of gross human rights violations relating to bodily integrity, perpetrated by the transitional government. Historically, some of the worst reports of similar violations emerged from the respective coup regimes of Jean-Bédél Bokassa in the Central African Republic, Ibrahim Babangida and Sani Abacha in Nigeria, and Idi Amin in Uganda, among others.⁶⁴

(ii) *Political Rights and Freedoms*

Coups d'état also structurally infringe on the right to free political participation.⁶⁵ Furthermore, *coups d'état* are by nature undemocratic as they impose regimes without the consent of the governed.⁶⁶ They, therefore, take away the people's capability to self-govern.⁶⁷ This, coupled with coups being deemed to sire dictatorships thereby inevitably shrinking the democratic space, amounts to a deprivation of the people's democratic rights such as participating in free and fair regular elections.⁶⁸ This extends beyond merely the change of government to even constitution-making and other internal processes of the state that are pivotal to democratic governance.⁶⁹ This state of affairs is, among other states, reflected in Uganda's history of *coups d'état* and dictatorship.⁷⁰

(iii) *Freedom of Expression*

In shrinking down the space for free political participation, *coups d'état* inevitably broadly clamp down on freedom of expression, to include freedom of speech,⁷¹ among other freedoms. With *coups d'état* imposing regimes without the consent of the governed, *coups d'état* negatively impact on the right of the governed to express themselves via the ballot in choosing their government via credible elections.⁷² The military is often deemed to be ill-suited to acknowledge freedom of expression broadly and particularly, freedom of speech, bearing in mind the totalitarian nature of military command structure.⁷³ In the case of *coups d'état*, this is

⁶⁴ These *coups d'état* were all characterised by gross human rights violations such as forced displacement, enforced disappearances, torture and extrajudicial killings, among other violations.

⁶⁵ Fredrick Cowell 'Preventing coups in Africa: attempts at the protection of human rights and constitutions' (2011) 15 *The International Journal of Human Rights* 5 at 754.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ Frederick Golooba-Mutebi 'Collapse, War and Reconstruction in Uganda an analytical Narrative on State-Making' (2008) Working paper No.27 *Development as State-Making* at 1.

⁷¹ Cowell op cit note 47 at 755.

⁷² Ibid.

⁷³ Ibid.

often reflected in the conduct of the military regimes during their incumbency, with coup regimes often inclined to censor and control sources and outlets of information.⁷⁴

(iv) *Access to justice*

Coups d'état also often alter the structure of the state and compromise the independence of the judiciary and the partiality of judicial processes.⁷⁵ This inevitably infringes on the right of access to justice. It is worth noting that *coups d'état*, being undemocratic, are in themselves punctuated by a curtailment of due process.⁷⁶ It can be argued that judges, by remaining in office even where a *coup d'état* has taken place, effectively endorse the new regime as in some systems, judges are perceived to embody and reflect the government's legitimacy and authority.⁷⁷ This, however, places judges in a conundrum since if they continue to follow the pre-coup legal order and constitution, their rulings may not be complied with as coup regimes often rule by decree.⁷⁸ This also leads to judicial chaos and, the judges also risk being dismissed from their positions.⁷⁹

V. CONCLUSION

This chapter defined a *coup d'état* as being characterised by the infiltration of a small but critical segment of the government, typically by the military, which then seizes governmental power.⁸⁰ The chapter also drew a distinction between 'failed' and successful *coups d'état*, defining the former and the latter as being thwarted and, culminating in the seizure of power and change of government respectively. Focusing on successful *coups d'état*, the chapter further looked at the difference between 'bloody' and 'bloodless' *coups d'état*. It characterised the former as being punctuated by violence, bloodshed and human casualties while in terms of the latter, only threats of violence are employed in the seizure of power. The chapter also briefly distinguished *coups d'état* from revolutions while conceding some similarities between the two phenomena in some instances. Considering the effects of *coups d'état*, it submits that while other *coups d'état* are deemed to be good/democratic, *coups d'état* are in themselves counteractive to democracy and are illegal. Further, *coups d'état* inevitably breed gross infractions of the most basic human rights. The next chapter considers the global trends and

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Edward Luttwak *Coup d'État: A Practical Handbook* (1969) 172.

distribution of *coups d'état*. It takes a closer look at *coups d'état* and Africa. It will serve as a background to subsequent discussions on the legality or otherwise of *coups d'état* within the international legal system.

CHAPTER 3: *COUPS D'ÉTAT* AND AFRICA

I. INTRODUCTION

This chapter focuses on the prevalence of *coups d'état* in Africa. It seeks to chiefly establish whether Africa has experienced a disproportionately higher number of *coups d'état* in comparison with other continents. The chapter, therefore, performs a data analysis in which it shall consider global coup trends between 1950 and 2017. In doing so, it shall track the global frequency and distribution of *coups d'état*. It shall also specifically look at the spatial and temporal distribution of *coups d'état* in Africa. Based on the data analysis, the chapter shall generally explain the distribution of *coups d'état*. The chapter ultimately briefly considers scholarly writings on the causes of *coups d'état* in Africa while also seeking to determine whether African states remain susceptible to *coups d'état*.

II. *COUPS D'ÉTAT* AND AFRICA

Kufuor alludes to 'a rarity' of constitutional governmental transitions in African politics.¹ He labels *coups d'état*, as being among the most prominent and consistent features thereof.² The focus of this dissertation is on successful *coups d'état* post World War II (1945). The end of World War II coincides with the advent of decolonization and democratization in Africa, with Ghana being the first African state to attain independence a few years later, in 1957. This period is particularly important as the wave of decolonisation saw the emergence of a largely significant portion of sovereign states at present.³ It is trite to note that by definition, *coups d'état* take place within states and, colonies are not states.⁴ As such, coups are unique to states.⁵ In order to track the distribution of *coups d'état* across the world historically, this chapter relies on a dataset compiled by Powell and Thyne on global attempts between years 1950 and 2017.⁶ Some of the statistics therefrom are illustrated in Figure 1 below:

¹ Kofi O Kufuor 'The OAU and the Recognition of Governments in Africa: Analyzing Its Practice and Proposals for the Future' (2002) 17 *American University International Law Review* 2 at 369.

² *Ibid* at 370.

³ A J Christopher 'Decolonisation without independence' (2002) 3 *GeoJournal* 56 p 213.

⁴ Robert Jackman, Rosemary O'Kane, Thomas Johnson, Pat McGowan and Robert Slater 'Explaining African *Coups d'état*' (1986) 1 *American Political Science Review* 80 at 256.

⁵ *Ibid*.

⁶ Silvia Romanelli 'Coups d'état. (1950 and 2017)' available at <https://silviaromanelli.com/2018/05/12/coups-detat-1950-and-2017/>, accessed on 26 September 2019.

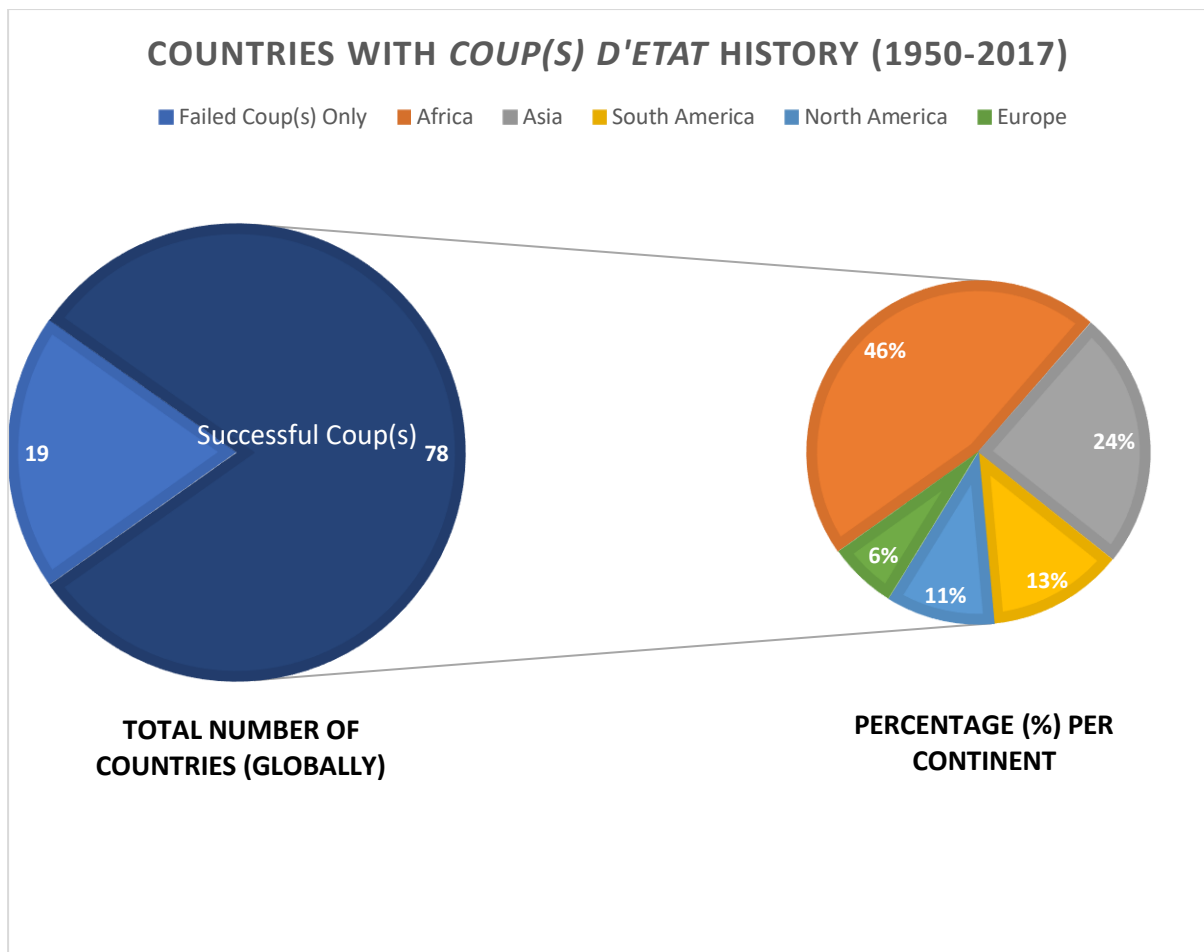


Figure 1: Countries that experienced *coup(s) d'état* between 1950 and 2017⁷

Within this period, up to ninety-seven (97) countries encountered coup attempts, both successful and unsuccessful. Out of all these countries, only seventy-eight (78) have encountered at least one successful *coup d'état*. Thirty-six (36) out of the seventy-eight (78) countries which have experienced at least one successful *coup d'état* are in Africa, followed by nineteen (19) in Asia, ten (10) in South America, eight (8) in North America and five (5) in Europe.

It is important to note that South America has had the highest percentage of countries that encountered successful *coups d'état* over other continents, with about 83% of the countries (ie. ten (10) out of twelve (12)) having encountered a minimum of one successful *coup d'état*. This is followed by Africa, with about 66% (thirty-six (36) out of fifty-four (54)). Asia comes

Jonathan Powell and Clayton Thyne 'Global Instances of Coups from 1950-Present' (2011) 48 *Journal of Peace Research* 2 249-259.

⁷ Graph created by the author using data obtained from the following sources:

Romanelli *ibid*.

Powell and Thyne *ibid*.

after Africa 39% (nineteen (19) out of forty-eight (48)), followed by North America 34% (eight (8) out of twenty-three (23)). Europe has been the least affected on a global scale, having just 11% (Five (5) out of forty-four (44)). This research however particularly focuses on Africa therefore, South America is beyond the scope of the chapter. The focus on Africa stems from the premise that Africa, being the continent with the most counties, has had the highest number of countries having experienced coups compared to other continents. Africa as a whole is also peculiar as it has continuously experienced recurring *coups d'état* versus other continents to date. Further, Africa remains susceptible to *coups d'état*. These facts shall become apparent in sections that follow.

Several countries have however experienced multiple and recurrent coup events. The global coup instances between 1950 and 2017 are illustrated in Figure 2 below:

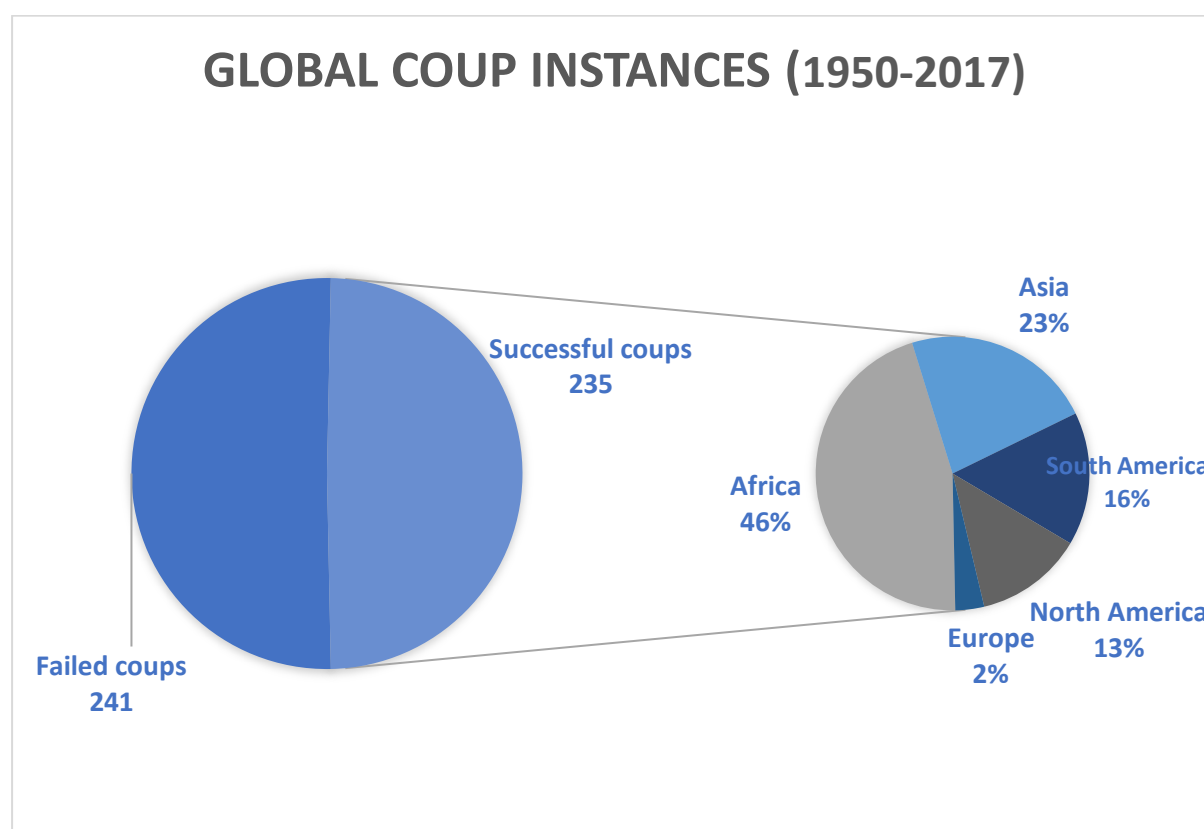


Figure 2: Global Coup instances between 1950 and 2017⁸

Globally, only twenty-three (23) countries have each experienced a single successful *coup d'état*, with twelve (12) of them being in Africa. Powell and Thyne's coup dataset⁹ also reflects Four Hundred and Seventy-Six (476) global coup instances between 1950 and 2017,

⁸ Ibid.

⁹ Op cit note 6.

with Two Hundred and Thirty-Five (235) having been successful. Of the successful *coups d'état*, Africa has experienced One Hundred and Seven (107), followed by Asia and the Middle East with Fifty-Three (53), South America with Thirty-Seven (37), North America with Thirty (30), and Europe with Eight (8).

Powell and Thyne's dataset also reflects an uneven distribution of *coups d'état* in Africa geographically. The trends are illustrated in Figure 3 below:

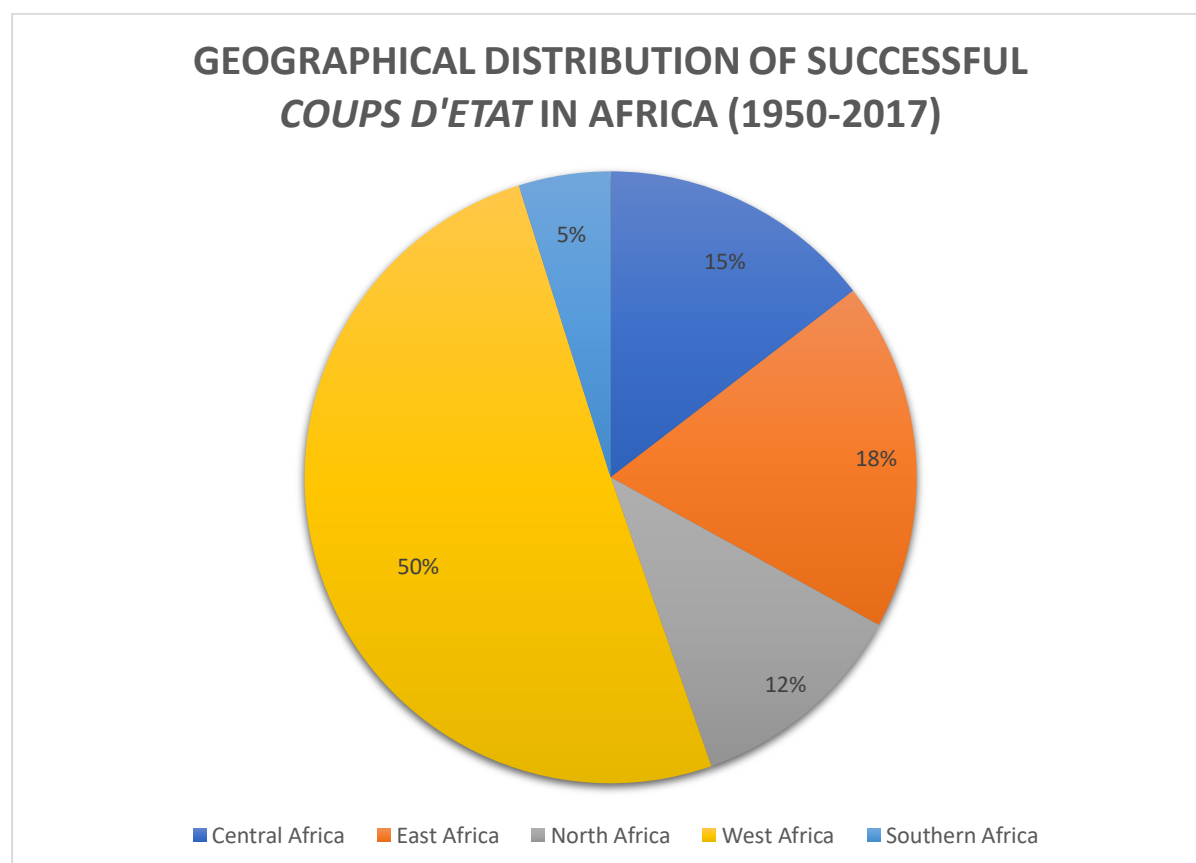


Figure 3: Geographical/regional distribution of Successful Coups d'état Across Africa¹⁰

Between 1950 and 2017, West Africa has had the highest prevalence of *coups d'état* with fifty-two (52), followed by East Africa with nineteen (19), Central Africa with fifteen (15), North Africa with twelve (12), and Southern Africa having the lowest prevalence with just five (5) successful *coups d'état*.

The prevalence of successful *coups d'état* in Africa has also varied from decade to decade between 1950 and 2017 as illustrated in Figure 4 below:

¹⁰ Op cit note 7.

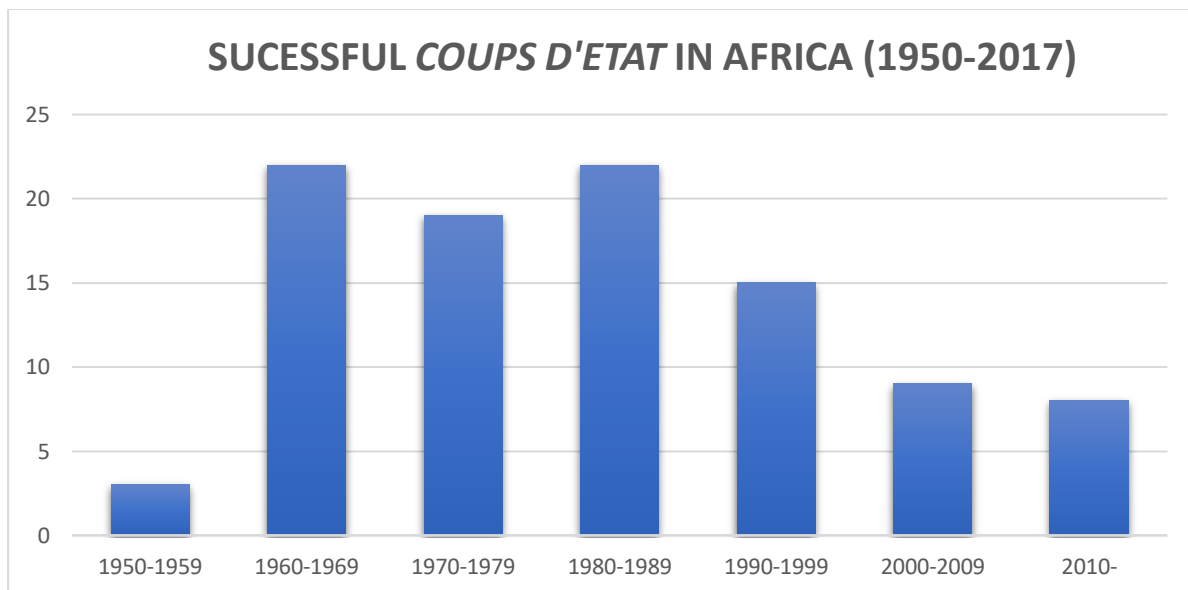


Figure 4: Temporal Distribution of Successful Coups d'état in Africa.¹¹

A total of three (3) successful *coups d'état* were recorded between 1950 and 1959 followed by a sharp rise to twenty-two (22) between 1960 and 1969. There was a slight recession between 1970 and 1979 where nineteen (19) coups were recorded, followed by a slight increase between 1980 and 1989 where once again, twenty-two (22) coups were recorded. Fifteen successful coups were recorded between 1990 and 1999 followed by nine (9) and eight (8) from 2000 to 2009 and from 2010 to 2017 respectively. The data reflects a notable decline in successful coups on the continent.

a) Explaining the distribution of *coups d'état*

The data analysis conducted above reflects that the countries with the highest prevalence of *coups d'état* are mostly in close proximity with each other and largely fall under the same geographical regions. Following from this, bigger regions as far as the number of states is concerned, generally seem to have experienced a higher number of *coups d'état*.

An overwhelming majority of the *coups d'état* have also generally been witnessed in older African States (by date of independence). Most of these states are located in West Africa. Younger regions as evidenced by Southern Africa (being the youngest region) have experienced the least number of *coups d'état* to date.

Further, most *coups d'état* have been witnessed in the 'Global South'. This term largely and collectively denotes states in regions external to Europe and North America. These are

¹¹ Ibid.

mostly underdeveloped, low-income states and, often culturally and/or politically marginalized. This description matches most African states, the majority of which do not rank highly on the Human Development Index.¹² Regionally, there is an inverse relationship between the coup prevalence rate and the Human Development Value ie, regions with a lower development index value have experienced a high prevalence of *coups d'état*.

III. CAUSES OF *COUPS D'ÉTAT* IN AFRICA

Several scholars have studied the causes of *coups d'état* in Africa with Jackman (1978) attributing coups in new states, between 1960 and 1975, chiefly to cultural pluralism, social mobilization/modernisation, and political factors including mass participation and a variety of political parties.¹³ Jackman alludes to a direct relationship between the existence of a dominant ethnic group within the state apparatus, along with social mobilisation, and instability in new sub-Saharan states.¹⁴ He further alludes to another direct relationship between multi-party democracies and instability in comparison with the existence of a single dominant party in the African context.¹⁵ Building on Jackman's work, Johnson, Slater, and McGowan (1984) go on to suggest that fewer *coups d'état* were experienced in 'states with relatively dynamic economies whose societies were not very socially mobilized before independence and which have maintained or restored some degree of political participation and political pluralism...' in contrast to those with directly opposing characteristics.¹⁶

McBride (2004) and Collier and Hoeffler (2007) however examine the Military itself in an attempt to establish the determinants of a coup, with the former suggesting that military involvement in civilian politics is for largely personal reasons and 'greed', while according to the latter, a direct relationship can be perceived between the likelihood of *coups d'état* and the level of military spending by government.¹⁷ Collier and Hoeffler (2007) observe that, in countries where there is a high coup risk, governments typically allocate significant portions

¹² Nour Dados and Raewyn Connell 'The Global South' (2012) 11 *Contexts* 1 at 12

¹³ Robert W Jackman 'The Predictability of Coups d'état: A Model with African Data' (1978) *American Political Science Review* 72 at 1262.

¹⁴ *Ibid* at 1263.

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ Michael McBride, 'Crises, Coups, and Entry-deterring Reforms in Sub-Saharan Africa' (2004), Paul Collier and Anke Hoeffler, 'Military Spending and the Risks of *Coups d'état*' (2007).

of their national budgets and resources towards military spending while the inverse is true in states where coups have a low likelihood.¹⁸

Luckham (2001) attributes the high prevalence to *coups d'état* in Africa to the colonial legacy, particularly citing the inheritance of colonial political systems.¹⁹ While most African states have a colonial history, this claim, according to Souaré (2006), however, fails to account for some of the African countries with a comparatively high prevalence of coups yet having divergent colonial backgrounds.²⁰ This theory further fails to account for states like Ethiopia and Liberia, which do not have colonial backgrounds and yet have still experienced *coups d'état*, among others.

It is submitted that largely, the factors highlighted in this brief discussion of the causes of *coups d'état* in Africa are still present. To date, Africa still enjoys considerably high levels of ethnic diversity stemming from factors such as the formation of big colonial countries and relatively low levels of urbanisation, among others,²¹ both of which arguably reflect the legacy of colonization. Bearing Africa's high diversity in mind, ethnicity has, and continues to play a key role in the politics of African states. Further, it can be argued that since the advent of decolonization and independence, there has been a rise in multipartyism and pluralism across the continent. Being in the global south, most African states rank lowly when it comes to economic development globally.²² Although there are emerging reports on the decrease of Military spending by African states, the spending remains relatively high.²³ Owing to these factors among others, African states remain susceptible to *coups d'état*.

IV. CONCLUSION

This chapter looked at global *coups d'état* trends between 1950 and 2017 and demonstrated how, percentage-wise, more South American countries have experienced *coups d'état*. South America is however beyond the scope of this research. Further, a disproportionately higher

¹⁸ Ibid.

¹⁹ Robin Luckham et al. (2001) 'Conflict and Poverty in Sub-Saharan Africa: An Assessment of the Issues and Evidence' (2001) IDS Working Paper 128 Brighton, Sussex: Institute of Development Issues.

²⁰ Issaka K Souaré 'Civil Wars and *Coups d'Etat* in West Africa' (2006), 96.

²¹ Other factors include pre-colonial slave trade and Africa's tropical location (See Elliot Green Explaining Africa's Ethnic diversity.

²² Nour Dados and Raewyn Connell 'The Global South' (2012) 11 *Contexts* 1 at 12.

²³ Defenceweb 'African Military Spending Continues to Decrease' available at <https://www.defenceweb.co.za/land/land-land/african-military-spending-continues-to-decrease/>, accessed on 6 January 2020.

number of states in Africa have however experienced *coups d'état* compared to other continents on a global scale, followed by Asia, South America, North America, and Europe respectively. The chapter went on to look at the distribution of successful *coups d'état* within the African continent and established an uneven distribution of coups in Africa regionally. West Africa has had a disproportionately higher prevalence of *coups d'état* trailed by East Africa, Central Africa, and North Africa respectively while Southern Africa has been the most stable thus having the lowest coup prevalence continentally. The chapter then examined the temporal distribution of coups in Africa between 1950 and 2017 and demonstrated a gradual decline in continental coup instances since 1980. Pursuant to the data analysis on global *coups d'état* trends, the chapter also explained the general distribution of *coups d'état* in Africa. The chapter ultimately considered the causes of in *coups d'état* Africa. It submitted that largely, the factors that have historically caused *coups d'état* in Africa remain extant. Following from this, African states remain susceptible to *coups d'état*. The next chapter considers the legality of *coups d'état* under international law.

CHAPTER 4: THE INTERNATIONAL LAW ON *COUPS D'ÉTAT*

I. INTRODUCTION

The previous chapter examined the trends and distribution of *coups d'état* across the world, establishing that Africa has experienced more *coups d'état* than other continents. Having demonstrated the disproportionately high prevalence of *coups d'état* in Africa, this chapter considers the international law on *coups d'état*. It specifically seeks to establish whether *coups d'état* are in themselves outlawed under international law. This is because *coups d'état* are widely deemed to be unacceptable and have been condemned from time to time although there is uncertainty over the legal status of such condemnation at International law.¹ This probe shall, in some instances, be tackled from an international, continental, and regional standpoint.

The chapter will also crisply consider the Specially Affected States (SAS) doctrine and the extent, if any, that it can be useful in establishing the international law norms on *coups d'état*. This will be done considering the research's focus towards Africa coupled with the claim that Africa has experienced more *coups d'état* than elsewhere in the world. The chapter also assesses whether *coups d'état* amount to wrongful acts at international law and, whether international law recognises democracy as a right. Before examining the sources of international law, the chapter shall begin by briefly looking at state sovereignty and its relevance in the conversation concerning *coups d'état* and international law.

II. STATE SOVEREIGNTY UNDER INTERNATIONAL LAW

With the focus of this dissertation being on *coups d'état*, which occur within states, it is imperative to briefly consider the notion of state sovereignty. This is because international law recognises states as its primary subjects² and, it predicates its authority on the consent of states.³ State sovereignty is also recognised among the basic components of statehood.⁴ Pursuant to this, international law, therefore, recognizes the sovereignty of states among its key tenets. While the idea of state sovereignty under international law is arguably fluid and remains

¹ Jean d'Aspremont 'Responsibility for Coups d'Etat in International Law' *Tulane Journal of International & Comparative Law*, Vol. 18, No. 2 At p 451

² Tom W Bennet and Jonathan Strugg 'Introduction to International Law' (2013) at 57.

³ See the Lotus Case (France v turkey) 1927 PCIJ rep series a No 10 at 18.

⁴ S B M Marume, R R Jubenkanda, C W Namusi and N C Madziyire 'An analysis of essential elements of the State' (2016) 5 *International Journal of Engineering Science Invention* 3 at 24.

contested, an underlying theme of the state having ultimate dominion over its territory and its internal affairs exists.⁵ This implies that the internal affairs of state are sacrosanct and ought not to be subject to any external interference whatsoever. Such internal affairs arguably include the form and nature of transition from one government to another and, the transfer of power thereof, among other things. From this alone, a position can be taken that *prima facie*, international law does not proscribe *coups d'état* in any way whatsoever as it does not concern itself with the internal affairs of states. In order to test this position and dissect it further, the chapter shall turn to the sources of international law.

III. SOURCES OF INTERNATIONAL LAW

In trying to understand the functioning and effectiveness of International law in addressing the high prevalence of coups in Africa, it is imperative to consider its sources. The International Court of Justice (ICJ) Statute⁶ under Article 38 is deemed to provide an authoritative position regarding the traditional sources of International Law.⁷ This is because the ICJ statute is a key component of the United Nations (UN) Charter,⁸ thereby being part of the United Nations system. Flowing from this, every member of the UN is automatically a state party to the ICJ Statute.⁹ Article 38(1) of the Statute¹⁰ reads as follows:

- ‘1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’¹¹

⁵ Gerard Kreijen (ed) ‘State, Sovereignty, and International Governance’ (2002) at 6.

⁶ United Nations, *Statute of the International Court of Justice*, 18 April 1946.

⁷ Bennet and Strug Op cit note 2 p 11.

⁸ Specified by Ch XIV of the United Nations Charter.

⁹ United Nations, *Charter of the United Nations*, 24 October 1945.

¹⁰ United Nations, *Statute of the International Court of Justice*, 18 April 1946.

¹¹ Ibid at Article 38(1).

These sources can be distinguished into either formal or material sources,¹² with formal sources being those from which rules of law derive their validity and authority while material sources provide the content and substance of the rules.¹³ This distinction has however been criticized due to the overlap existing sometimes between these sets of sources resulting in the lack of a clear separation.¹⁴ Such distinctions are thus not worth pursuing for the purposes of this chapter. It is however key to examine the sources of international law per article 38(1) of the ICJ Statute¹⁵.

a) General Principles of Law

The ‘general principles of law...’ form part of the sources of both national and international law that have enjoyed widespread recognition.¹⁶ They however only serve as a subsidiary source of International law in the absence of treaties or custom.¹⁷ They are therefore only relevant in instances where a separate legal obligation is already in existence.¹⁸ The importance of such general principles is however such that when a particular position is supported by universal public opinion, the courts are justified in taking them.¹⁹

b) Judicial decisions and the teachings

Like the general principles of law, judicial decisions and the writings of legal scholars are subsidiary in nature and are used in determining the rules of law.²⁰ They, however, are not independent sources of international law but, when considered in tandem with general principles of law and custom, they are pivotal in ascertaining the existence of particular rules under international law.²¹ International law knows no system of precedent. It should therefore be noted that judicial decisions are subject to Article 59 of the ICJ Statute,²² which emphasises that their binding force is limited to the parties to the matter under consideration.²³ They,

¹² Georg Schwarzenberger *International Law* 3 ed Vol 1 (1957) at 26-27.

¹³ John Salmond *Jurisprudence* 7 ed (1924) at para 44.

¹⁴ Malcolm N Shaw *International Law* (1986) at 58.

¹⁵ ICJ Statute supra note 10.

¹⁶ Cherif Bassiouni ‘A Functional Approach to ‘General Principles of International Law’’ (1990) 11 *Michigan Journal of International Law* 3 at 768.

¹⁷ Ibid p 782.

¹⁸ Bassiouni Op cit note 16 p 782.

¹⁹ Martens Bos ‘A Methodology of International Law’ (1984) p70.

²⁰ Michael Peil ‘Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice’ (2012) 1 *Cambridge Journal of International and Comparative Law* 3 p 136-137.

²¹ Shaw op cit note 14 p86, 88.

²² ICJ Statute supra note 10 Article 59.

²³ Ibid.

however, remain pivotal as the ICJ, being the chief judicial organ under the UN system, is widely regarded as having an authoritative voice in interpreting international law.²⁴

Furthermore, when many states, through their courts, accept particular principles as legal justifications for arriving at certain decisions, this may count as proof of widespread acceptance of such principles and such decisions form part of international law. As far as the writings of leading and highly qualified legal scholars are concerned, it is particularly difficult to ascertain what exactly falls under this bracket. This consequently limits the weight and authority of such scholarship although it continues to be relevant in litigation and in analysing the development of international law, among other things as they can be consulted from time to time in determining the content of international law.²⁵

Given the fact that general principles of law and judicial decisions along with scholarly writings are only subsidiary in nature, this chapter shall not examine them as standalone sources of international law. Their strength will be examined in the light of existing treaties and custom. The focus of this chapter will therefore be on treaties and custom as sources of International Law.

c) International Conventions/ Treaties

International conventions are arguably the most frequent and specific conduits through which rules under international law are created.²⁶ The Vienna Convention on the Law of Treaties²⁷ (Vienna Convention) recognises international conventions as a source of international law.²⁸ The term ‘convention’ is synonymous with treaties, covenants, memoranda of understanding, acts, pacts, and protocols among other agreements.²⁹ While a proliferation of terms is apparent, a golden thread running through all such agreements is that of a union of intentions of a minimum of two subjects of international law in order to regulate their respective interests by international rules.³⁰ Such consensus of state parties, as captured in the treaties, provides certainty and makes treaties the most binding and robust source of international law. Treaties as a source of international law afford states a significant level of freedom in the determination of rights and duties, they may want to create for themselves. This freedom is however fettered

²⁴ Shaw op cit note 14 p86.

²⁵ Ibid p 89.

²⁶ Shaw Op cit note 14 at 77 -81.

²⁷ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969.

²⁸ Ibid.

²⁹ Shaw op cit note 14 at 76.

³⁰ Antonio Cassese *International Law* (2001) at 126.

by article 53 of the Vienna Convention³¹ which highlights that treaties become void if, on conclusion, they contravene *ius cogens*.³² Treaties traditionally bind states party to them.³³ In some instances, treaties may, however, appear to bind states that are not party to them by virtue of them being a codification of CIL. The Vienna Convention is one such example of a treaty whose provisions are widely acknowledged as a codification of CIL.³⁴ Additionally, some treaties do evolve into custom, with the Geneva conventions being the most prominent examples of this.³⁵ Custom as a source of international law shall, however, be discussed below.

(i) *United Nations Conventions/ Treaties on coups d'état and democracy*

The condemnation of *coups d'état* by the international community in several instances, has warranted the perception of *coups d'état* being an international crime.³⁶ International Law at the UN level is however devoid of treaties/conventions expressly proscribing *coups d'état*. It is worth noting that international agreements have historically and typically been vague in their make-up. This can mostly be attributed to the need for consensus in such agreements in the process of their formulation. An express and specific rejection of *coups d'état* via treaties/conventions would arguably be atypical. A broader subject would therefore be that of 'democracy'. This particularly comes into play following from the assertion that *coups d'état* by nature, are counteractive to democracy.³⁷

The UN Charter, being a very prominent treaty under International Law, is devoid of any express mention the term 'democracy'.³⁸ Its preamble, however, commences with the words 'We the people...', which can be argued to be an implicit embodiment of democratic values, with the legitimacy of sovereign states stemming from the 'will of the people'. With sovereignty of states being a central theme under international law, this also arguably implicitly elevates the importance of democracy.

³¹ Vienna convention Supra note 27 at Article 53.

³² Ibid.

³³ Vienna convention Supra note 27 Article 26.

³⁴ E W Vierdrag 'The Law Governing Treaty Relations between Parties to the Vienna Convention on the Law of Treaties and States not Party to the Convention' (1982) 76 *American Journal of International Law* 4 at 788.

³⁵ Theodor Meron 'The Geneva Conventions as Customary Law' (1987) 18 *American Journal of International Law* 2 at 349.

³⁶ Siegfried Pausewang 'A UN Convention to Ward Off Coups d'Etat?' (1992) 23 *Bulletin of Peace Proposals* (1) at 67.

³⁷ Venkat Iyer 'Restoration Constitutionalism in the South Pacific' (2006) *Pacific Rim Law & Policy Journal* p 39.

³⁸ Roland Rich 'Bringing Democracy into International Law' (2001) 3 *Journal of Democracy* at 20.

The Universal Declaration of Human Rights(UDHR)³⁹ describes the ‘will of the people’ as being the ultimate source of governmental power.⁴⁰ Further, such ‘will’ is to be expressed via regular, democratic elections.⁴¹ The UDHR on its own does not command binding force and it merely serves as a framework on Human Rights at International Law.⁴² Scholarship has however emerged suggesting that several UDHR provisions have evolved into Customary international law thus binding all states.⁴³

The International Covenant on Civil and Political Rights (ICCPR) on the other hand actually establishes the legal grounds for democratic principles at international law. These include the freedom of opinion and expression,⁴⁴ freedom of association,⁴⁵ the right to participate in public affairs,⁴⁶ and the right to vote and to be elected in regular and democratic elections.⁴⁷ With 172 states party to it, nearly 90% of the UN member states have signed up to the ICCPR. Nearly all African countries have signed up to the ICCPR except South Sudan and the Western Sahara.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁴⁸ also alludes to democratic values when it obliges its member states to ensure gender equality in exercising the right to vote and be eligible for election,⁴⁹ to participate in government policy formulation,⁵⁰ and to hold public office⁵¹ among other things. The convention has also been ratified by 189 states, which translates to about 98% of the UN member States. This includes most African states, with the exception of Somalia and Sudan.

From this, it is submitted that there is no express proscription of *coups d'état* by international conventions/ treaties. To an extent, given the recognition given to the notion of democracy, particularly by the UDHR, CEDAW, and ICCPR, it can, however, be argued that this translates to an implicit proscription of *coups d'état* under international law.

³⁹ United Nations General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

⁴⁰ Ibid at Article (21) (3).

⁴¹ Ibid

⁴² Michael Reisman ‘Sovereignty & Human Rights In Contemporary International Law’ (1990) *Yale Law School Faculty Scholarship*.

⁴³ Hurst Hannum ‘The UDHR in National and International Law’ (1998) 144 *Health & Human Rights* 3 at 145.

⁴⁴ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966 at Article 19

⁴⁵ Ibid at Article 22.

⁴⁶ Ibid at Article 25(a).

⁴⁷ Ibid at Article 25.

⁴⁸ UNGA, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979.

⁴⁹ Ibid at Article 7(a).

⁵⁰ Ibid at Article 7(b).

⁵¹ Ibid at 7(c).

(ii) *African Conventions/ Treaties on coups d'état and democracy*

At the African Union level, three main instruments are of importance regarding the subject of *coups d'état* and also democracy namely, the AU Constitutive Act (AUCA),⁵² Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government⁵³ (Lomé Declaration) and the African Charter on Democracy, Elections and Governance.⁵⁴

The Lomé Declaration was adopted by the Organisation of African Unity (OAU) and subsequently adopted by the AU. Put together in the background of the 'resurgence of *coups d'état* in Africa', the Lomé declaration characterises coups as an unacceptable threat to African peace and security and as being 'disturbing' and antagonistic to the continent-wide and continuing wave of democratization. It also recognizes that *coups d'état* on the continent have culminated in the most blatant violations of both AU and UN principles. The Lomé Declaration essentially proscribes *coups d'état*, as being unconstitutional changes of government. The declaration on its own is, however, not legally binding although it enjoys widespread political acceptance and still serves as a guide in many instances, including the measures the AU can take in the event of such unconstitutional transitions.⁵⁵

The AU Constitutive Act, the founding document of the African Union, highlights its rejection and condemnation of unconstitutional changes of government⁵⁶ among its guiding principles. It also stipulates that governments rising to power unconstitutionally, be suspended from participating in AU activities.⁵⁷ This can be interpreted as an express proscription of *coups d'état* under the AU constitutive Act. The AU constitutive has been ratified by all member AU member states thus which makes it binding on them.

In its Preamble, the African Charter on Democracy, Elections and Governance (ACDEG) recognizes democracy as one of the universal values and principles. It also signals its concern about unconstitutional changes of government and their role in perpetuating violent conflict, insecurity and instability on the continent. In its objectives, the charter also endeavours to promote the adherence to such 'universal values and principles' of democracy by the AU

⁵² African Union (AU), *Constitutive Act of the African Union*, 1 July 2000.

⁵³ African Union (AU), *Lomé Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, 2000.

⁵⁴ African Union, *African Charter on Democracy, Elections and Governance*, 30 January 2007.

⁵⁵ R Dube *Fighting unconstitutional changes of government or merely politicking? A critical analysis of the African Union response* LLM (University of Pretoria) (2010) 7.

⁵⁶ AU Constitutive Act op cit note 52 at Article 4(p).

⁵⁷ Ibid at Article 30.

member states. The Charter also prescribes the imposition of sanctions⁵⁸ by the African Union in the event of unconstitutional transitions, which include coups *d'état*,⁵⁹ among other forms. The ACDEG is a legally binding document that has more than 80% of African States as signatories.

The African framework on *coups d'état* and democracy can therefore be interpreted as an express proscription of *coups d'état* given the acknowledgement of democracy among 'universal values and principles' at international law, the rejection of extraconstitutional changes of government, and the prescribed response in the form of suspension from AU activities, along with the imposition of sanctions.

(iii) *Regional Conventions/ Treaties on coups d'état and democracy*

The Southern African Development Community (SADC)

The SADC treaty,⁶⁰ SADC's founding document, acknowledges the need for the 'guarantee of democratic rights, observance of human rights and the rule of law' in its preamble. It further outlines, as part of the body's principles, the rule of law, solidarity, democracy, peace and security, and human rights.⁶¹ The treaty, however, does not expressly proscribe *coups d'état* or any other extra-constitutional change of government.

The treaty also provides for the SADC Organ on Politics, Defence and Security, whose purpose and objectives are expressed in the SADC Protocol on Politics, defence and security⁶². The protocol acknowledges, as part of its objectives, the promotion of the development of democratic institutions and practices within SADC member states, along with the respect for universal human rights,⁶³ among other objectives. In accordance with the Organ's drive towards the management of inter and intra-state conflict via peaceful means, the protocol deems military coups as being forms of intra-state conflict.⁶⁴

⁵⁸ African Charter on Democracy and Elections op cit note 54 Chapter 8.

⁵⁹ Ibid at Article 23(1).

⁶⁰ Southern African Development Community (SADC), *Declaration and Treaty*, 28 February 1998.

⁶¹ Ibid at Article 4.

⁶² Southern African Development Community (SADC), *Protocol on Politics, Defence and Security*, 14 August 2001.

⁶³ Ibid at Article 2 (g).

⁶⁴ Ibid at Article 11(2)(b)(ii).

Economic Community of West African States (ECOWAS)

The ECOWAS treaty,⁶⁵ the ECOWAS founding document, does not expressly proscribe *coups d'état*. The treaty, however, lists the 'promotion and consolidation of a democratic system of governance...' ⁶⁶ in its member States among its fundamental principles. The ECOWAS Protocol on Democracy and Good Governance⁶⁷ affirms 'Zero tolerance for power obtained or maintained by unconstitutional means'⁶⁸ and, popular participation along with 'strict adherence to democratic principles....' ⁶⁹ among its Constitutional Governance Principles. Under Section IV, the protocol prescribes the role of Security Forces in a democracy as being that of defending the independence and territorial integrity of countries and their democratic institutions.⁷⁰ The protocol also prescribes that the various components of the member states' security sectors should be under legal, civilian authorities.⁷¹

The Protocol also prescribes the imposition of wide-ranging sanctions on the state in question where 'democracy is abruptly brought to an end by any means' or where there is a serious infraction of human rights.⁷² It also states that apart from the sanctions, a decision may be taken, at the recommendation of the Mediation and Security Council, to turn to the conflict management regime prescribed by the Protocol Relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security ⁷³ which may include the deployment of civilian and military force to maintain or enforce peace and security where needed.⁷⁴

Neither the SADC nor the ECOWAS frameworks expressly proscribe *coups d'état*. Furthermore, the SADC framework's acknowledgement of democracy is not as forceful as that of ECOWAS, which observes a 'strict adherence to democratic principles while, totally rejecting the seizure of governmental power by unconstitutional means. The ECOWAS framework solidifies its commitment towards democracy and the rejection of the

⁶⁵ Economic Community of West African States (ECOWAS), *Revised Treaty of the Economic Community of West African States (ECOWAS)*, 24 July 1993.

⁶⁶ Ibid at Article 4 (j).

⁶⁷ Economic Community of West African States (ECOWAS), *Protocol on Democracy and Good Governance*, 21 December 2001.

⁶⁸ Ibid at Article 1(c).

⁶⁹ Ibid at Article 1(d).

⁷⁰ Ibid at Article 19(1).

⁷¹ Ibid at Article 20(1).

⁷² Ibid at Article 45(1).

⁷³ Economic Community of West African States (ECOWAS), *Protocol Relating to the Mechanism, For Conflict Prevention, Management, Resolution, Peacekeeping and Security*, 10 December 1999.

⁷⁴ Ibid at Articles 3(h), Article 31.

unconstitutional seizure of governmental power by also prescribing the imposition of sanctions where democracy is interfered with.

d) International Custom as a Source of International Law

In most modern domestic legal systems, custom is typically inconsequential as far as the law is concerned.⁷⁵ It is however a prominent and dynamic source of international law⁷⁶ considering the make-up of the international system and, how it lacks a well-defined and centralised governmental system like that under municipal law. As alluded to earlier in the chapter, customary rules derive from the behaviour and practice of states. In ascertaining the behaviour and practice of states, it may be useful to consider the respective states' historical archives, newspapers, official legal manuals on questions of law, legal opinions of national legal advisors and, diplomatic exchanges, among other things.⁷⁷ One may also consider the municipal laws of the states in question,⁷⁸ along with the respective governments' response to national court decisions, the International Law commission's draft articles, treaties, and the general practice of international organisations, among other things.⁷⁹ The International organisations in question include the United Nations General Assembly and the United Nations Security Council, both of which come up with resolutions from time to time.⁸⁰

The states, in acting in a particular way, must believe that they are bound by a legal obligation (*opinio juris*) and that acting otherwise would be illegal.⁸¹ This makes Customary international law difficult to decipher as the practice of states is not written down compared to treaties as alluded to above. It is deemed to be by far the most widespread source of international law, arguably binding all states, except those that persistently object to the rules.⁸² This is in stark contrast with treaties as discussed above as their reach is typically confined to their signatories. Notwithstanding the unwritten nature of state practice, customary

⁷⁵ Shaw *supra* note 14 at p 59.

⁷⁶ ICJ Statute *op cit* note 10 at 38(1)(b)., *Ibid* at 59.

⁷⁷ Shaw *op cit* note 14 at 69.

⁷⁸ *Ibid*; The *Scotia Case* (USA vs. UK, 1871) p81.

⁷⁹ Shaw *supra* note 10 at 69.

⁸⁰ It should be noted that the resolutions of the GA and the SC are not in themselves sources of international law although they may be evidence of state practice. *See* Gregory H Fox, Kristen E. Boon and Issacs Jenkins 'The Contributions of United Nations Security Council Resolutions To the Law of Non-International armed Conflict: New Evidence of Customary International Law' *American University Law Review* (2018) at pages, 693, 695; Samuel A. Bleicher 'The Legal Significance of Re-Citation of General Assembly Resolutions' *American Journal of International Law*, Vol. 63, No. 3 (1969) p 444.

⁸¹ *Lotus Case* (*France v. Turkey*) (1927) P.C.I.J., Ser. A, No. 10 p 18, 28., *North Sea Continental Shelf Cases* (*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands*), ICJ. Reports 1969, p.3, International Court of Justice (ICJ), 20 February 1969.

⁸² Michael P Scharf 'Accelerated Formation of Customary International Law' (2014) 20 *ILSA Journal of International & Comparative Law* 2 p 309.

international law remains binding upon states.⁸³ It should also be noted that in some instances, it is possible to have rules that only bind a particular group of states.⁸⁴ This can be referred to as local custom⁸⁵ and it is a position supported and confirmed by the ICJ in the *Asylum case*⁸⁶ where the court held that a party relying on a particular custom should prove the existence of the custom to the extent that it binds the other party in question.⁸⁷ The ICJ, while laying out the requirements for state practice to translate into customary international law in the *North Sea Continental Shelf Case*⁸⁸ states that ‘...state practice, including that of states whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked....’.⁸⁹ This brings to the fore the Specially Affected States (SAS) Doctrine, which is of significant importance regarding CIL, in light of the high premium seemingly placed on the practice of such states. This doctrine will however be discussed later in the chapter.

(i) *International Custom on Coups d’état and Democracy*

With treaties being deemed as indicative of state practice in some instances⁹⁰ and, having established the absence of treaties expressly proscribing *coups d’état* at UN level, compounded with the absence of ICJ rulings in that light or, rooted in democracy, it can be inferred, at first glance, that there is no international custom against *coups d’état*. Further, it can also be inferred that there is no right to democracy at international law. It should however be noted that the UDHR⁹¹ under Article 21(3) describes ‘the will of the people’, expressed via regular, democratic elections, as the ultimate source of governmental authority.⁹² This provision is key as it is commonly argued that the UDHR has in fact evolved into CIL.⁹³ As alluded to earlier, a state’s internal affairs, including the form of governmental transition, were traditionally deemed as exclusive to the respective state and sacrosanct.⁹⁴ The post-cold war era has however been characterised by increasing popularity of democracy under international law. This popularity is evidenced by the majority of UN member states having legally committed to

⁸³ ICJ Statute op cit note 6 at Article 38(1)(b).

⁸⁴ Shaw, supra note 14 at 79; *Asylum Case (Colombia v. Peru)*, International Court of Justice (ICJ), 20 November 1950 at 266.

⁸⁵ Ibid.

⁸⁶ *Asylum Case* Supra note 84.

⁸⁷ Ibid at p 276.

⁸⁸ *North Sea Continental Shelf Case* supra note 81.

⁸⁹ Ibid at p 43.

⁹⁰ Ibid.

⁹¹ UDHR op cit note 39.

⁹² Ibid.

⁹³ Reisman op cit note 42.

⁹⁴ Marume, Jubenkanda, Namusi Madziyire op cit note 4.

allowing open, secret ballot and multi-party elections.⁹⁵ It has commonly been argued that the legitimacy of governments has increasingly ceased being exclusively tested against the states' respective internal standards.⁹⁶ Instead, such legitimacy ought to be measured against universal norms and standards, which include democracy.⁹⁷ This is otherwise referred to as the 'democratic entitlement' and it falls in sharp contrast with the rigid and traditional variant of exclusivity in the name of state sovereignty. This inevitably influences the status of *coups d'état* at international law, with scholars arguing that by inference, the emergence of norms on the 'democratic entitlement' inevitably entails a proscription of *coups d'état* at international law as the ascension of governments to power via coups cannot be reconciled with democratic norms.⁹⁸

(ii) *Customary International Law Proscription of Coups d'état*

In some instances, the condemnation of *coups d'état* preceded the advent and prominence of democratic norms to the extent that, for example, in the early 20th century, Central American states imposed sanctions in response to *coups d'état*.⁹⁹ The cold war, however, saw an increase in the relative toleration of *coups d'état* since, in some instances, some blocs embraced this as a way to eject governments seen as bearing different ideologies.¹⁰⁰ This however changed post the cold war as the legitimacy of states was increasingly recognised as being premised on their respective sources of power, particularly the democratic origin thereof.¹⁰¹ With the increasing recognition and prominence of democratic norms came the systematic rejection and increased condemnation of coup regimes.¹⁰²

IV. STATE PRACTICE

The post-cold war period has been characterised by attitudes against the unconstitutional overthrow of governments. This chiefly stems from the notion that democracy ought to be an irreversible process.¹⁰³ The condemnation of *coups d'état* by states is by nature *ex post facto*

⁹⁵ Thomas M. Franck 'The Emerging Right to Democratic Governance' (1992) 86 *The American Journal of International Law* 1 at p 47.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ d'Aspremont supra note 1 at p 454.

⁹⁹ See, e.g., Additional Treaty to the Treaty of Peace Concluded at the Central American Conference art. 1, Dec. 20, 1907, 2 S. TREATY DOC. No. 61-357, p. 2397 (1910).

¹⁰⁰ d'Aspremont op cit note 1 at 455.

¹⁰¹ Ibid.

¹⁰² Ibid at 456.

¹⁰³ Ibid.

owing to its perceived contravention of democratic principles,¹⁰⁴ thus the community of states only being able to react after the *coups d'état*. The condemnations are also typically coupled with diplomatic and economic sanctions, along with pressure to revert to democracy, with states, in some instances even going to the extent of expressing their support of the toppled, democratically elected governments.¹⁰⁵ Such measures are also employed, and have in numerous cases been endorsed by International Organisations.

a) State Practice and International Organisations

Consideration of the actions of international organisations is paramount in establishing customary international law as these actions commonly reflect state practice. Like the states, international organisations have also condemned and in some instances imposed sanctions against coup regimes. Some organisations have, over time, formalised their mechanisms for the imposition of sanctions via treaties and formal proclamations, among other means.

The United Nations, however, being the most prominent international organisation collectively at international law is, in fact, devoid of treaties proscribing *coups d'état*. Further, the ICJ has never made a ruling relating to *coups d'état*, nor has it grounded any of its rulings on the principles of democracy since its inception. Instead, taking cognisance of the ICCPR and CEDAW's positions,¹⁰⁶ along with their respective, widespread acceptance, an argument can be made supporting the existence of international custom recognising democracy as a right/entitlement.

In attempting to establish international custom, it is imperative to turn to General Assembly and Security Council resolutions as they may reflect the practices of the community of states.¹⁰⁷

(i) UNGA Resolutions on Democracy (Post-Cold War)

The UNGA has perennially adopted resolutions relating to democracy and democratic principles in the post-cold war period (1991 to date). Some of the most prominent of these resolutions were around the immediate aftermath of the cold war, concerned with South Africa

¹⁰⁴ Ibid.

¹⁰⁵ Ibid at 457.

¹⁰⁶ The ICCPR establishes the legal grounds for democratic principles at international Law ie. freedom of opinion and expression, freedom of association, the right to participate in public affairs (directly or through elected representatives), and the right to vote and to be elected in regular and democratic elections. See ICCPR supra note 33 at Articles 19,22, 25.;

CEDAW alludes democratic values when it obliges its member states to ensure gender equality in exercising the right to vote and be eligible for election, to participate in government policy formulation, and to hold public office among other things. See CEDAW supra note 37 Article 7.

¹⁰⁷ Fox op cit note 80.

and Haiti. In its 46th session, among several other resolutions concerning Apartheid South Africa, the UNGA adopted a resolution on international efforts on eliminating apartheid along with the establishment of a non-racial, democratic South Africa.¹⁰⁸ In terms of this resolution, the UNGA called upon South Africa's representatives to engage, in good faith, in processes that would ensure, among other things, a 'successful transition' to a democratic order'.¹⁰⁹ This was followed by a similar resolution during the UNGA's 47th session in which the UNGA encouraged the community of states to aid the transition and process towards the adoption of a new, non-racial and democratic constitution in South Africa.¹¹⁰ During the 48th Session, the UNGA yet again adopted a similar resolution, where it expressed its concern on the instability that would potentially derail the transition to a democratic, non-racial South Africa.¹¹¹ It also welcomed the development of an electoral framework complementing the transition in that regard.¹¹² This was further reiterated in the UNGA Resolution on Democratic and non-racial elections in South Africa.¹¹³ The UNGA ultimately endorsed South Africa's democratic transition and congratulated it for the successful process.¹¹⁴

The UNGA also adopted a resolution on democracy and human rights in Haiti¹¹⁵ in which it reiterated the position in the UDHR, of the will of the people, expressed via regular and genuine elections as being the source of governmental authority.¹¹⁶ The UNGA also condemned the illegal replacement of the democratically elected president in Haiti and called upon states to take measures in support of the UNGA resolutions in that regard.¹¹⁷ In subsequent resolutions on the same matter in its 47th session, it reiterated the goal of the international community as being that of restoring democracy in Haiti and, it called upon the international community to impose arms embargos on Haiti until it reverted to democracy.¹¹⁸ The UNGA persistently reiterated its position on this matter and the matter was kept open and it carried over to the 48th session and beyond as the situation in Haiti persisted. It is worth

¹⁰⁸ UN General Assembly, 13 December 1991, A/RES/46/709A.

¹⁰⁹ Ibid at 7

¹¹⁰ UNGA, 18 December 1992 A/RES/47/116A.

¹¹¹ UNGA, A/RES/48/159A.

¹¹² Ibid.

¹¹³ UNGA, 21 January 1994, A/RES/48/233.

¹¹⁴ UNGA, 23 June 1994, A/RES/48/258A-B.

¹¹⁵ UNGA, 11 October 1991, A/RES/46/7.

¹¹⁶ UDHR op cit note 39 at 21(3).

¹¹⁷ Op cit note 115 at 1,4.

¹¹⁸ UNGA, A/RES/27/20 B; UNGA, A/RES/27/20 A at 8.

noting that all these resolutions on Haiti related to the deterioration of democracy and human rights that resulted from the 1991 *coup d'état*.¹¹⁹

Other general (ie, not country-specific) but nonetheless noteworthy UNGA resolutions adopted around this period include resolutions on 'Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization'¹²⁰ (49th Session), which also has a follow-up resolution under the same title,¹²¹ adopted during the 50th Session of the UNGA. During this session, the UNGA also adopted a resolution on the 'Support by the UN System of the efforts of Governments to promote and consolidate new or restored democracies'.¹²² As recently as 2018 the UNGA adopted the resolution on 'Promotion of a democratic and equitable international order'¹²³ in which it recognised democracy, among other things, as a key component in the foundation towards social and people-centred sustainable development.¹²⁴

(ii) *UNGA Resolutions Against Coups d'état (Post-Cold War)*

Other examples of the UNGA's response to *coups d'état* include resolutions on the Burundian and Honduran *coups d'état* of 1993 and 2009 respectively. During its 48th session, the UNGA adopted a resolution on the situation in Burundi¹²⁵ where it expressed its deep concern on the *coup d'état* in Burundi, unreservedly condemned it and demanded that the perpetrators thereof disarmed and retreated to their barracks.¹²⁶ It also demanded the prompt 'restoration of democracy and the constitutional regime'. During its 63rd session, the UNGA also adopted a resolution expressing its deep concern on the Honduran *coup d'état* and the breakdown of the constitutional and democratic order.¹²⁷ It went on to condemn the *coup d'état* and demanded the unconditional reinstatement of the constitutional government previously deposed and strongly called upon states to only recognize the deposed government.

¹¹⁹ 'Haiti's Military Assumes Power After Troops Arrest the President' *The New York Times* 1 October 1991, available at <https://www.nytimes.com/1991/10/01/us/haiti-s-military-assumes-power-after-troops-arrest-the-president.html>, accessed on 20 November 2019.

¹²⁰ UN General Assembly, 9 March 2019, A/RES/49/190.

¹²¹ UNGA, 6 March 1996, A/RES/50/185.

¹²² UNGA, 16 February 1996, A/RES/50/133.

¹²³ UNGA, 17 December 2019, A/RES/73/169.

¹²⁴ Ibid.

¹²⁵ UNGA, 3 November 1993, A/RES/48/17.

¹²⁶ Ibid.

¹²⁷ UNGA, 29 June 2009, A/RES/63/301.

(iii) *UNSC Resolutions on Democracy (Post-Cold War)*

The UNSC has, from time to time, adopted resolutions on democracy in the post-cold war era. One such example is its resolution on the UN Mission in Haiti (1995)¹²⁸ where it stressed the importance of credible elections as key steps towards the ‘complete consolidation of democracy in Haiti.’ It also expressed its concern about irregularities in the Haitian electoral exercise of 1995.¹²⁹ In 1996, the UNSC also adopted another resolution extending the UN Mission in Haiti by four more months in order to support the newly elected government in Haiti.¹³⁰ It further emphasised the importance of a peaceful transfer of power to the government, while welcoming the democratic election of 1996. In 2002, the UNSC passed a resolution on the situation in East Timor,¹³¹ in which it reiterated its welcome for the successful and peaceful previously held elections, commending the ‘courage and vision’ of people of East Timor in driving the country towards independence via ‘peaceful and democratic means’. In 2011, the UNSC also adopted a resolution concerning Libya¹³² in which it welcomed developments in Libya, improving Libya’s ‘prospects for a democratic, peaceful and prosperous future’ and further expressed its anticipation of the establishment of a transitional government grounded by a ‘commitment to democracy, good governance, rule of law....’. The UNSC also reiterated the same position in its resolution on the UN Mission in Libya,¹³³ in the extension of a 2012 resolution in which it reaffirmed the role of the UN and the community of states in coordinating the process leading to the formation of a ‘democratic, independent and united Libya...’¹³⁴

(iv) *UNSC Resolutions Against Coups d’état (Post-Cold War)*

The UNSC has, from time to time, issued a series of statements and notes centrally and repeatedly condemning *coups d’état* in the post-cold war era. It has also adopted resolutions on *coups d’état*. In 1994, the UNSC adopted a resolution on the Haitian coup,¹³⁵ prescribing a wide range of sanctions against Haiti’s coup regime, such as travel embargoes.¹³⁶ It went on to authorize the formation of a multinational force to aid the vacating of office by the Haitian military regime.¹³⁷ The UNSC in 1996 also adopted a resolution in which it reiterated its

¹²⁸ UN Security Council, 31 July 1995, S/RES/1007.

¹²⁹ Ibid.

¹³⁰ UNSC, 29 February 1996, S/RES/1048.

¹³¹ UNSC, 17 May 2002, S/RES/1410.

¹³² UNSC, 27 October 2011, S/RES/2016.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ UNSC, 6 May 1994, S/RES/917.

¹³⁶ Ibid.

¹³⁷ UNSC, 31 July 1994, S/RES/940.

condemnation of the Burundian *coup d'état* and urged the regime to revert to constitutionalism.¹³⁸ In 2006, the UNSC adopted yet another resolution¹³⁹ in which it took note, with concern, reports of yet another attempted *coup d'état* in Burundi post the transitional period, reaffirming that attempts to seize power in such fashion would be unacceptable. In 2012, the UNSC also adopted a resolution demanding the restoration of constitutional order in Guinea-Bissau¹⁴⁰ and reiterating the condemnation by the international community, of the 2012 *coup d'état*. It went on to impose travel bans on the Guinea-Bissau coup Leaders.¹⁴¹

Other than the discussion on treaties above, the discussion on UNSC and UNGA resolutions provides insights on international custom, ie, custom that would be universally binding, on both subjects of *coups d'état* and democracy. Both UNGA and UNSC resolutions point towards democracy being an ideal and principle at CIL. Unlike the UNGA, it can be argued that when it comes to *coups d'état*, the UNSC, considering its language in its resolutions, takes a firmer approach. This suggests that at customary international law as deduced from the UNSC resolutions as evidence of state practice, *coups d'état* are prohibited. This position is further bolstered by the UNSC prescribing the imposition of sanctions on the coup regimes, by the community of states. The UNGA resolutions, however, reflect a more widespread representation of state practice compared to those of the UNSC whose membership is very limited. It is the position of this dissertation that the existence of UNGA resolutions in that regard arguably bolsters state practice rejecting *coups d'état*. Following from this, it can be argued that in terms of international custom as reflected by UNGA and UNSC resolutions read together, *coups d'état* are prohibited. Having considered international custom, there is also need to take a look at 'local custom'.

b) Local Custom

As highlighted earlier, in some instances, it is possible to have rules that only bind a particular group of states.¹⁴² This can be referred to as local custom.¹⁴³ Keeping in mind the high prevalence of *coups d'état* in Africa as illustrated in the 3rd Chapter, there may be an African set of customary rules in relation to *coup d'état*. Such rules would therefore stem from the practices of African States, which in turn can be evidenced by African treaties, conventions,

¹³⁸ UNSC, 30 August 1996, S/RES/1072.

¹³⁹ UNSC, 25 October 2006, S/RES/1719.

¹⁴⁰ UNSC, *Security Council resolution 2048*, 18 May 2012.

¹⁴¹ Ibid.

¹⁴² Shaw, *supra* note 6 at 79; Asylum Case *op cit* note 84 at 266.

¹⁴³ Ibid.

and agreements among other things. As noted earlier, the African Union framework in the form of the AU Constitutive Act, the Lomé Declaration, and the African Charter on Democracy, Elections and Governance, reject *coups d'état*, among other forms of irregular changes of government.¹⁴⁴ The African Union/OAU responses to *coups d'état* have however not been entirely consistent in the post-cold war era.

In light of the context in which the OAU was founded, i.e. decolonisation and anti-imperialism among other things,¹⁴⁵ it follows that the organisation put a high premium on the principle of non-interference, which punctuates the traditional conceptions of state sovereignty. This arguably led to *coups d'état* being accepted as legitimate forms of change of government.¹⁴⁶ As the OAU did not concern itself with the internal matters of states, as evidenced by its indifference towards *coups d'état*, which also persisted after the cold war era, it can thus be argued that *coups d'état*, as a form of change of government, did not traditionally contravene any regional/local customary international law norms.

Unlike the OAU, whose focus was on decolonisation, anti-imperialism and non-interference,¹⁴⁷ the AU was formed with a focus on the promotion of democracy and good governance.¹⁴⁸ It, therefore, follows that the AU created a strong normative framework around democracy and *coups d'état*, marking a stark contrast from the OAU stance. The AU has, in some instances, penalised the seizure of power via *coups d'état* with suspension from the AU and, in some instances, the imposition of embargoes and economic sanctions. Examples of these instances include the Guinean coup of 2008,¹⁴⁹ Mauritania in 2005 and 2008,¹⁵⁰

¹⁴⁴ See Erika de Wet 'The role of democratic legitimacy in the recognition of governments in Africa since the end of the Cold War' (2019) 13 *International Journal of Constitutional Law* 2 p472.

¹⁴⁵ See the Preamble of the Organization of African Unity (OAU), *Charter of the Organization of African Unity*, 25 May 1963.

¹⁴⁶ Prominent examples of such coups include the 1991 coups of Lesotho and Mali, the 1993 Nigerian coup and the 1996 Nigerien Coups, among others, all of which birthed governments recognised as being legitimate in Africa and beyond.

¹⁴⁷ Supra note 145.

¹⁴⁸ See the Preamble of the AU constitutive Act supra note 52.

¹⁴⁹ African Union Peace and Security Council, Press Statement, 20th Meeting, PSC/PR/BR.1(CCVI), October 15, 2009, <http://www.peaceau.org/uploads/presscommuniqué.pdf>.

¹⁵⁰ Jenny Booth 'Mauritania suspended from African Union after coup' *The Times* 4 August 2005 available at <https://www.thetimes.co.uk/article/mauritania-suspended-from-african-union-after-coup-vgsddx9f9tp>, accessed on 13 October 2019.

'African Union threatens Mauritania with sanctions' *AFP* 23 September 2008 available at <https://web.archive.org/web/20090201113935/http://afp.google.com/article/ALeqM5i7jyMd5kpBVp8-hOOr0vdN3qE3vw>, accessed on 13 October 2019.

Madagascar in 2009,¹⁵¹ Niger in 2010,¹⁵² Mali in 2012,¹⁵³ Egypt 2012,¹⁵⁴ the Central African Republic in 2013,¹⁵⁵ Burkina Faso in 2015,¹⁵⁶ and Sudan In 2019¹⁵⁷ where the African Union acted swiftly in the suspensions and the imposition of sanctions thereof, directing the countries to revert to constitutional order e.g. via a transitional measure, preceding democratic elections.

The interventions on *coups d'état* by the AU as noted above have however been controversial in certain instances.¹⁵⁸ This is because some of the regimes defended by the AU had in fact ascended to power via unconstitutional means.¹⁵⁹ A prominent example of this is the Central African Republic's coup of 2013 in which the government of President François Bozizé was toppled and the AU responded by suspending the CAR from AU activities and, imposing sanctions as highlighted above.¹⁶⁰ President Bozizé himself had however ascended to power via a *coup d'état* against president Ange-Félix Patassé in 2003.¹⁶¹

A peculiar case, however, is that of the Zimbabwean *coup d'état* of 2017 that ended in the resignation of long-serving President Robert Mugabe from office¹⁶² along with the arrests and exile of certain key members of his government. A new administration heavily backed by, and including, certain military protagonists subsequently took over. This transition enjoyed popular support locally as evidenced the massively attended marches and demonstrations. While this operation was condemned in some instances, including by President Alpha

¹⁵¹ AU Peace and Security Council, Communiqué of the 181st Meeting, PSC/PR/COMM.(CLXXXI), March 20, 2009, 4, <https://reliefweb.int/report/madagascar/madagascar-communiqué-181st-meeting-peace-and-security-council>.

¹⁵² 'AU suspends Niger after military coup' *BBC News* 20 February 2010 available at <http://news.bbc.co.uk/2/hi/africa/8525665.stm>, accessed on 13 October 2019.

¹⁵³ 'AU suspends Mali over coup' *Aljazeera News* 23 March 2012 available at <https://www.aljazeera.com/news/africa/2012/03/2012323134643629717.html>, accessed on 13 October 2019.

¹⁵⁴ AU Peace and Security Council, Communiqué of the 384th Meeting, PSC/PR/COMM.(CCCLXXXIV), July 5, 2013, 6, <http://www.peaceau.org/uploads/psc-384-com-egypt-05-07-2013.pdf>.

¹⁵⁵ AU Peace and Security Council, Communiqué of the 363rd Meeting, PSC/PR/COMM.(CCCLXIII), March 25, 2013, 6ff, <http://www.peaceau.org/en/>.

¹⁵⁶ AU Peace and Security Council, Communiqué of the 554th meeting, PSC/PR/COMM/3. (DXLIV), September 18, 2015, 11, 12, <http://www.peaceau.org/uploads/psc-544-comm-burkina-faso-18-9-2015.pdf>.

¹⁵⁷ 'AU suspends Sudan over military crackdown' *Aljazeera News* 7 June 2019 available at <https://www.aljazeera.com/news/2019/06/african-union-suspends-sudan-violence-protesters-190606113838460.html>, accessed on 14 October 2019.

¹⁵⁸ De Wet supra note 144.

¹⁵⁹ Ibid.

¹⁶⁰ Supra note 155.

¹⁶¹ 'A popular coup' *The Economist* 20 March 2013 available at <https://www.economist.com/middle-east-and-africa/2003/03/20/a-popular-coup>, accessed on 13 October 2019.

¹⁶² Peta Thornycroft, Roland Oliphant & Louise Burke 'Zimbabwe's president Robert Mugabe finally resigns, sparking wild jubilation on the streets of Harare' *The Telegraph* 21 November 2017, available at <https://www.telegraph.co.uk/news/2017/11/21/zimbabwes-president-robert-mugabe-has-resigned-speaker-says/>, accessed on 14 September 2019.

Conde,¹⁶³ the Leader of Guinea, who also chaired the African Union at the time, the African Union itself, however, issued a statement in which it did not classify the military operation as a coup but rather ‘a popular expression’ of the will of the Zimbabwean people.¹⁶⁴ This was yet again in stark contrast with the AU position taken in the case of the toppling of Egypt’s Mahomed Morsi via a *coup d’état* that similarly enjoyed popular support.¹⁶⁵ Unlike in the Zimbabwean scenario, Egypt was suspended from AU activities in the wake of the *coup d’état*.¹⁶⁶ Instances such as the Zimbabwean scenario, being isolated and fairly uncommon, can, however, be argued to be exceptions to the growing norm of rejecting coups.

A generalised assessment of the OAU/AU’s position on *coups d’état* points towards a somewhat inconsistent approach. A shift is however discernible in the approaches of the OAU (pre 2002) and the AU (post the OAU era), with the OAU exercising restraint on internal matters of states, thus making *coups d’état* a common means of governmental change, while there is a pattern of rejecting *coups d’état* in the AU era. Following from this, and notwithstanding the inconsistency in state practice in certain instances, it is submitted that there is a local customary prohibition of *coups d’état* in Africa. The gradual development of this position is also evidenced by the gradual decline in the prevalence of *coups d’état* in Africa over time, as illustrated via the data analysis carried out in Chapter 3.¹⁶⁷ It is also strengthened further by the existence of African treaties and protocols rejecting *coups d’état*.

c) Specially Affected States Doctrine (SAS)

The essence of the express articulation of the SAS doctrine by the ICJ in the *North Sea Continental Shelf* case¹⁶⁸ is that practice resulting in the formation of customary international law should include the practice of states ‘whose interests were specially affected.’¹⁶⁹ Since delivering this judgment in 1969, the ICJ is yet to develop this doctrine further in its

¹⁶³ ‘African Union chief Alpha Conde says body will never accept Zimbabwe ‘coup’, demands respect for Constitution’ AFP 17 November 2017 available at <https://www.firstpost.com/world/african-union-chief-alpha-conde-says-body-will-never-accept-zimbabwe-coup-demands-respect-for-constitution-4214087.html>, accessed on 13 October 2019.

¹⁶⁴ ‘Statement of the Chairperson of the Commission of the African Union on the Situation in Zimbabwe’ African Union 21 November 2019 available at <https://au.int/en/pressreleases/20171121/statement-chairperson-commission-african-union-situation-zimbabwe>, accessed on 13 October 2019.

¹⁶⁵ Neil Ketchley ‘How Egypt’s generals used street protests to stage a coup’ *The Washington Post* 3 July 2017 <https://www.washingtonpost.com/news/monkey-cage/wp/2017/07/03/how-egypts-generals-used-street-protests-to-stage-a-coup/>, accessed on 13 October 2019.

¹⁶⁶ Aaron Maasho ‘African Union suspends Egypt’ *Reuters* 5 July 2013 available at <https://www.reuters.com/article/us-egypt-protests-africa/african-union-suspends-egypt-idUSBRE9640EP20130705>, accessed on 13 October 2019.

¹⁶⁷ See Figure 4 (SUCCESSFUL COUPS D’ETAT IN AFRICA (1950 and 2017)).

¹⁶⁸ Supra note 81.

¹⁶⁹ Ibid at p 43.

judgments¹⁷⁰ although it has in some instances implicitly relied upon the doctrine as was the case in the *Fisheries Jurisdiction case*¹⁷¹ (1974). This has inevitably resulted in uncertainty as to the content, scope, proper function and interpretation of the SAS Doctrine under international law. This doctrine has also been rarely invoked, with only three countries, namely the United Kingdom, Germany, and the United States of America, having formally cited it to date.¹⁷² Two main questions appear to stick out as far as the SAS doctrine is concerned. The first one is that of when a state should be considered as being specially affected.¹⁷³ The second one has to do with the importance of the practice of the SAS in question in the formation of custom.¹⁷⁴

The most prominent instances of the invocation of the SAS doctrine post the *North Sea Continental shelf case* have been by the United States of America, which have all been in the context of armed conflict. The USA, in the *Nuclear Weapons case*¹⁷⁵ adopted the stance that customary law could not emerge over the objections of the states that held nuclear weapons.¹⁷⁶ From this, it can be discerned that in terms of the US' conception of the doctrine, a state would count as being specially affected by simply participating in practice whose customary status is in question¹⁷⁷ rather than being potentially or actually prejudiced or harmed. The USA's conception of the doctrine arguably concentrates power to form custom in the hands of more powerful states, while also giving the 'specially affected states' ultimate dominion in the formation of custom.¹⁷⁸ This conception has been seconded by several scholars in the global north, thus putting a premium on the role and importance of powerful states in developing custom.¹⁷⁹ Arguably, such a conception however inevitably disregards the practice of weaker states, especially in the global south. This, in turn, may inevitably result in the distortion of customary international law as a whole given the importance of the practice of states in its formation.

¹⁷⁰ Kevin Jon Heller 'Specially-Affected States and the Formation of Custom' 112 *American Journal of International Law* (2018) page 1.

¹⁷¹ *Fisheries Jurisdiction, United Kingdom v Iceland, Merits, Judgment*, [1974] ICJ Rep 3, ICGJ 142 (ICJ 1974), 25th July 1974.

¹⁷² Heller Op cit note 171 at 4.

¹⁷³ Ibid at 6.

¹⁷⁴ Ibid.

¹⁷⁵ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 ICJ Rep. 226 (July 8)

¹⁷⁶ Ibid.

¹⁷⁷ Heller op cit note 171 p5.

¹⁷⁸ Ibid at 18.

¹⁷⁹ Ibid.

In a different conception, the African Union (AU) also recently invoked the SAS doctrine in the *Chagos Island* dispute, arguing for the consideration of African and post-colonial states as ‘specially affected’ in the matter on the status of the decolonisation of Mauritius under CIL.¹⁸⁰ Other than the geographical facet (ie, the respective states’ location), this conception seems to shift the classification of SAS to those that have, historically or otherwise, been on the receiving end of a particular practice.¹⁸¹ In this particular context, the conception does seem to protect states in the global south, unlike in the case of the USA’s conception.

It should, however, be noted that the importance of the specially affected states over the non-specially affected-states in the creation of international custom is incontrovertible given the insistence by the ICJ in the *North Sea Continental shelf* case¹⁸² that state practice cannot be deemed to be ‘widespread and representative’ unless it encompasses that of specially affected states.¹⁸³ Such insistence by the ICJ is particularly key because, notwithstanding the fact that its rulings are not universally binding,¹⁸⁴ the ICJ is widely regarded as bearing an authoritative voice when interpreting international law.¹⁸⁵

The ICJ jurisprudence, however, seems to suggest two classes of states that count as being ‘specially affected’ namely states that exclusively partake in a particular practice (*North Sea Continental Shelf*),¹⁸⁶ and states uniquely affected by a particular practice to the exclusion of other states (*Fisheries Jurisdiction, Marshall Island cases*).¹⁸⁷

It has been established that Africa has historically experienced the highest prevalence of *coups d’état* compared to any other continent. By virtue of this, African states can be deemed as being ‘specially affected’, not only based on their geographical location, but also because they have been, and continue to be, more susceptible to coups due to a number of factors that have existed historically on the continent, and, remain persistent. These factors, as discussed

¹⁸⁰ ‘The AU Invokes the Doctrine of Specially-Affected States in Chagos Island’ *OpinioJuris* 18 December 2018, available at <http://opiniojuris.org/2018/12/18/the-au-invokes-the-doctrine-of-specially-affected-states-in-chagos-island/>, accessed on 7 January 2020.

¹⁸¹ Heller op cit note 171 p41.

¹⁸² *North Sea Continental Shelf Cases* (Ger./Den.; Ger./Neth.), Judgment, 1969 ICJ Rep. 3, (Feb. 20).

¹⁸³ Ibid.

¹⁸⁴ ICJ statute op cit note 6.

¹⁸⁵ Shaw op cit note 14 p86.

¹⁸⁶ Ibid.

¹⁸⁷ *Fisheries Jurisdiction, Germany v Iceland, Interim Measures, Order*, [1973] ICJ Rep 313, ICGJ 145 (ICJ 1973), 12th July 1973, United Nations [UN]; International Court of Justice [ICJ] Advisory Opinion, Letter Dated 22 June 1995 from the Permanent Representative of the Marshall Islands to the United Nations, Together with the Written Statement of the Government of the Marshall Islands (Int’l Ct. Just. June 22, 1995).

in chapter three, include a range of socio-economic and political factors among other things, which have persisted and remain extant.¹⁸⁸ It is, however, difficult to apply the USA's conception of the SAS doctrine to the Context of *coups d'état* in Africa, firstly considering the context in which it was invoked by the USA (ie *jus ad bellum*). The requirement of the state merely being a 'participant' in the practice in question does seem quite vague and unspecific. It should however be noted that *coups d'état* as discussed in this research, typically do only take place internally, with the states experiencing *coups d'état* being the only states 'participant'. This, therefore, means in accordance with the USA's version of the SAS doctrine, African states count as being 'specially affected', as far as *coups d'état* are concerned.

Turning to the African Union's conception of the SAS doctrine as expressed in the *Chagos Island* dispute ie, of specially affected states being those that have, historically or otherwise, been on the receiving end of a particular practice, African states, having historically experienced more *coups d'état* globally and remaining prone to *coups d'état* at present, count as being specially affected. This means that as far as *coups d'état* are concerned, whichever interpretation used (ie the USA's or the African Union's) African states can be classified as being specially affected. Following from this, the African approach of rejecting *coups d'état*, therefore, takes precedence in the determination of Customary International Law on *coups d'état*. Further, the African approach as reflected in the practice of the specially affected states, coupled with the widespread and representative rejection of *coups d'état* as perceived through the UNGA and UNSC resolutions among other things, ultimately reflects a Customary International Law proscription of *coups d'état*. It is also this research's position that Africa, being specially affected by the scourge of *coups d'état* and having a more express local customary rejection of *coups d'état*, has and continues to in fact play a leading role in the development of a general proscription of *coups d'état*, under customary international law.

d) Problems with the CIL on *coups d'état*

A key characteristic of CIL is that it is generally uncodified. Following from this, CIL is a dynamic source of international law, whose content is bound to change from time to time. As an example, state practice at some point reflected the exercise of extreme restraint when it came to the internal affairs of states as alluded to earlier. This included the form of transition from one government to another. It can therefore be argued that *coups d'état* once used to be an acceptable means of governmental change thus being commonplace. There however has been

¹⁸⁸ See section on Causes of *Coups d'état* in Chapter 2.

an apparent shift in state practice with coups increasingly being rejected in the post-cold war era. Following from this, it is the position of this dissertation that there is an international customary law proscription of *coups d'état*. The fluid nature of CIL coupled with it being unwritten, however, exposes the problem of the uncertainty of the Customary International Law on *coups d'état*. This, in turn, can be argued to have led to a somewhat inconsistent response to *coups d'état* by the community of states with some *coups d'état* being totally rejected, coupled with the imposition of sanctions among other forms of intervention, while in some instances, like the Zimbabwean *coup d'état* of 2017,¹⁸⁹ this approach has not been adhered to.

In light of the problems with the CIL on *coups d'état*, notwithstanding the noted decline in the prevalence of *coups d'état* in Africa, African states remain prone to *coups d'état* and they have continued to occur.

V. COUP D'ÉTAT AS WRONGFUL ACTS AT INTERNATIONAL LAW

The existence of international law norms against *coups d'état* is independent of the question of whether *coups d'état* do in fact amount to wrongful acts under international law. Having established the international law norms on *coups d'état*, it is therefore important to separately interrogate whether *coups d'état* amount to wrongful acts at international law. Questions relating to wrongful acts under international law are often deemed as inextricably linked to that of State Responsibility as international law recognises states as its primary subjects.¹⁹⁰ The International Law Commission (ILC) draft articles on state responsibility¹⁹¹ designate every wrongful act of a state at international law as entailing the international responsibility of the state.¹⁹² For something to amount to an internationally wrongful act of a state, it should be a commission or omission 1) attributable to the state at international law¹⁹³ and, 2) amounting to a breach of an international obligation by the state.¹⁹⁴

A massive hurdle would, however, be that of attributing a *coup d'état* to a state. This is because as discussed in the 2nd Chapter, *coups d'état* 'consist of the infiltration of a small but

¹⁸⁹ 'Zimbabwe's Mugabe 'under house arrest' after army takeover' *BBC News* 15 November 2017, available at <https://www.bbc.com/news/world-africa-41997982>, accessed on 6 January 2020.

¹⁹⁰ Bennet and Strugg op cit note 2 at 57.

¹⁹¹ International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

¹⁹² Ibid at Article 1.

¹⁹³ Ibid at Article 2(a).

¹⁹⁴ Ibid at Article 2(b).

critical segment of the state apparatus, usually the military, which is then used to overthrow the government from its control on the state.¹⁹⁵ Given that *coups d'état* are usually conducted by elements of the military, which are typically recognised as being organs of, or individuals operating under the authority of the state, it is also tempting to conclude that *coups d'état* are therefore attributable to the state. Such attribution attaches to the state even in instances where the organs or individuals in question act in excess of their authority.¹⁹⁶ In the event of the military elements in question being deemed as not being organs of the state, their conduct may still be attributable to the state if they end up being part of the substantive governments of the states in question.¹⁹⁷ In the absence of the actions of the military operations in question being attributable to a foreign state, the attribution of *coups d'état* discussed above presents an illogical situation in which a state ought to be held responsible for organising and carrying out a *coup d'état* against itself. This, therefore, makes the attribution of a *coup d'état* to a state virtually impossible. It is therefore tempting to conclude that unless attributable to states, *coups d'état* are not wrongful acts at international law. Considering the existence of customary norms against *coup d'état* as established earlier, it is, however, this research's position that *coups d'état* do in fact amount to a breach of an international law obligation to observe democracy and not overthrow a constitutionally elected government. It is thus submitted that by contravening international law norms, *coups d'état* amount to wrongful acts at international law. This, it is submitted, is an example of the scope of international law going beyond states-it's primary subjects.

VI. DEMOCRATIC GOVERNANCE AS A RIGHT AT INTERNATIONAL LAW

The subjects of *coups d'état* and democracy are inextricably linked as evidenced by the prominence of 'democracy' in this chapter's discussion of *coups d'état*. Further, *coups d'état* are arguably an antithesis of democracy. The question emerging from this however is one of whether democracy can be deemed as a right under international law. The term 'Democracy' is nowhere in the United Nations Charter or even the Covenant of the League of Nations.¹⁹⁸ Furthermore, even the standard International Law textbooks are void of chapters concerned

¹⁹⁵ Edward Luttwak *Coup d'État: A Practical Handbook* (1969) 172.

¹⁹⁶ ILC Draft Articles on State Responsibility Supra note 191 at Articles 7.

¹⁹⁷ Ibid at Article 10 (1).

¹⁹⁸ Roland Rich 'Bringing Democracy into International Law' (2001) 3 *Journal of Democracy* at 20.

with ‘democracy’ and, the International Court of Justice (ICJ) has never grounded any of its rulings on the legal foundation of democratic norms.¹⁹⁹ This can be interpreted as International law being indifferent to the idea of democracy being a right in international law.²⁰⁰ With this in mind, coupled with the traditional conceptions of sovereignty and the principle of non-interference, any attempts by ‘democratic’ members of the community of states to impose their model of governance, among other things, onto their ‘undemocratic’ counterparts would traditionally be in contravention of International law. A similar analogy is reflected in the *Nicaragua Case* (merits)²⁰¹ where the ICJ dismissed the USA’s contention that it had a right to intervene in the affairs of Nicaragua, in support of ‘political and moral’ values of the internal opposition.²⁰²

Contrary to that position, state practice alluded to in this chapter however increasingly appears to place a high premium on democracy. This is evident as certain governments, along with their actions, have been condemned and sometimes sanctioned for conduct deemed as undemocratic. This validates Franck’s idea of an emerging right to democratic governance at international law.²⁰³ Following from this, the democratic entitlement has gradually evolved from merely being rooted in morality, towards becoming a key requirement under international law.²⁰⁴ He further argues that governments increasingly recognize that their legitimacy is dependent upon meeting normative expectations of the community of states.²⁰⁵ Such recognition has resulted in the emergence of a concomitant expectation by the community of states that ‘those who seek the validation of their empowerment patently govern with the consent of the governed’.²⁰⁶ This requirement, he argues, is applicable to all and is implemented via global standards, with the aid of both international and regional organizations.²⁰⁷ Petersen agrees and goes on to consider, as his point of departure, the idea of an emerging right to democratic governance as posited by Franck. He, however, argues that while there may be an emergence of a right to democratic governance, democracy is in reality not a strict obligation

¹⁹⁹ Ibid.

²⁰⁰ Same Varayudej ‘Right to Democracy in International Law: Its Implications for Asia’ (2006) 12 Annual Survey of International & Comparative Law 1 at 1

²⁰¹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*; Merits, International Court of Justice (ICJ), 27 June 1986.

²⁰² Ibid.

²⁰³ Thomas M. Franck ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 1.

²⁰⁴ Ibid at 47.

²⁰⁵ Ibid at 46.

²⁰⁶ Ibid.

²⁰⁷ Ibid at 47.

at international law and it takes the form of a teleological principle.²⁰⁸ This means that states therefore essentially bear an obligation to strive and evolve towards democracy and to reinforce and optimize it post the establishment of electoral institutions.²⁰⁹ This can be concisely referred to as democratization. Rather than there being a right to democratic governance, Petersen posits that a teleological principle exists at international law, where states are under an obligation to evolve towards democracy.²¹⁰

While there is evidence of the widespread recognition of the democracy as evidenced by state practice, the continued existence of states that do not subscribe to this form of government is worth acknowledging. Even though international law may be deemed to have welcomed the concept of democracy, it is backed by inconsistent state practice. It is therefore tempting to conclude that democracy remains just a general principle at international law and is not firmly anchored in the traditional sources of international law. It is however this chapter's position that although not being necessarily universal, the recognition of democracy remains widespread. Democracy is, therefore, beyond a general principle at International law. It has since evolved into a right, derogation from which has warranted condemnation from the community of states.

VII. CONCLUSION

This chapter considered the international law norms on *coups d'état*. It has also been noted that *coups d'état*, being increasingly deemed as antagonistic towards international law norms on democracy and the unconstitutional deposition of democratically elected governments, amount to wrongful acts at international law. This is notwithstanding the impossibility of attributing a *coup d'état* to a state. This was, in some instances, considered from an international, continental, and regional standpoint. The chapter began by briefly looking into the doctrine of state sovereignty. This is because state sovereignty is deemed to be an essential component of international law and, it arguably implies that the internal affairs of states are sacrosanct. From this, it was submitted that *prima facie*, international law does not proscribe *coups d'état* in any way as it does not concern itself with the internal affairs of states. In order to test this position,

²⁰⁸ Petersen Niels 'The Principle of Democratic Teleology in International Law' (2008) 24 *Brooklyn Journal of international law* at 16.

²⁰⁹ Ibid

²¹⁰ Ibid at 51.

the chapter then turned to the sources of international law namely treaties, custom, general principles and judicial decisions and the teachings and writings of international law scholars.

The chapter submitted that there is no express proscription of *coups d'état* by conventions/ treaties. It, however, acknowledged the recognition given to the notion of democracy, particularly by the UDHR, CEDAW, and ICCPR, among other treaties as translating to an implicit proscription of *coups d'état* under international law. The chapter also acknowledged the existence of a CIL recognition of democracy as a general principle, along with a customary international law proscription of *coups d'état*. The chapter also considered the OAU/AU position on *coups d'état* and established that while this generalised assessment points towards an inconsistent approach, a shift is however apparent in the approaches of the OAU (pre 2002) and the AU (post the OAU era). The OAU has traditionally exercised restraint on internal matters of states thus making *coups d'état* a common means of governmental change. This is unlike the AU era where there has been a pattern of rejecting *coups d'état*, albeit not entirely consistent. Following from this, the chapter argued that the pattern is indicative of African 'local custom' proscribing *coups d'état*.

The chapter then considered the SAS doctrine, as local custom is key in establishing customary international law in light of this doctrine. Keeping in mind the fact that Africa has had a disproportionately high prevalence of coups globally as established in the 3rd Chapter, this chapter submitted that the local African custom of rejecting *coups d'état*, coupled with the widespread rejection of *coups d'état*, reflects customary international law against coups d'état. It also submitted that African states, being specially affected by *coups d'état*, have played a leading role in the development of this norm. The chapter also looked at the shortcomings of the customary international law thereof, highlighting uncertainty, which in turn, has arguably resulted in inconsistency in the response to *coups d'état* and in the treatment of coup regimes in Africa. As far as the idea of democratic governance as a right at international law is concerned, it has been submitted that democracy has evolved from being just a general principle to being a right under international law.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

I. CHAPTER SUMMARIES & CONCLUSIONS

Coups d'état have historically been a common means of governmental change. They, however, seem to have been more common and recurrent in Africa than elsewhere and remain a threat in African politics. Among other things, *coups d'état* have yielded bloodshed and instability. They have also been condemned in many instances. In some cases, such condemnation has been questioned and argued to be an infraction of the sovereignty of states. This is because the sovereignty of states has often been considered the bedrock of international law as states are the primary subjects of international law. Arguably, state sovereignty implies that the internal affairs of states remain sacrosanct and ought to be immune to any external interference. Such affairs arguably include the transfer of governmental power. 'Sovereignty' has been characterised as an unsettled concept at international law.¹ It can, however, be truncated to the idea of a state having ultimate dominion over its own affairs,² with the exception of where the state expressly consents to give away such dominion.³ Within this background, there has been uncertainty regarding international law's position on *coups d'état*.

Coups d'état and revolutions share the commonality of being regarded as irregular forms of change of government. Following from this, there is sometimes a conflation between the two. *Coups d'état* 'consist of the infiltration of a small but critical segment of the state apparatus, which is then used to displace the government from its control of the remainder'.⁴ Revolutions, on the other hand, can be defined as 'irregular, extraconstitutional, and sometimes violent changes of political regimes and control of state power brought about by popular movements'.⁵ Coups are typically carried out by 'the military or other elites within the state apparatus'⁶ thus commonly being referred to as 'military coups'. The military officers may then go on to form the next government or, install a civilian government, while usually maintaining their control and influence in the establishment vicariously. Coups can be 'bloody'

¹ Tom W Bennet and Jonathan Strugg 'Introduction to International Law' (2013) at 47.

² Nico Schrijver 'The Changing Nature of State Sovereignty' (2000) at 71.

³ Stephen D Krasner 'The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law' (2004) at 1077.

⁴ Edward Luttwak *Coup d'État: A Practical Handbook* (1969) 172.

⁵ Jeff Goodwin *No Other Way Out STATE AND REVOLUTIONARY MOVEMENTS 1945-1991* (2001) 9.

⁶ Nhlalo Ndaba 'Army trucks in Harare spark panic; military insiders urge calm' *Times LIVE* 14 November 2017, available at <https://www.timeslive.co.za/news/africa/2017-11-14-army-trucks-in-harare-spark-panic-military-insiders-urge-calm/>, accessed on 14 September 2019.

or ‘bloodless’ with the former characterised by violent means and fatalities,⁷ while in terms of the latter, only the threat of use of force is employed as the means to seize power.⁸ *Coups d’état* can further be classified as successful or failed, among other things.⁹ Successful *coups d’état* ultimately culminate in a change of government but in terms of a failed coup, the operation is thwarted thereby not effecting any change.¹⁰ While other *coups d’état* are deemed to be good/democratic, it should be noted that *coups d’état* are in themselves counteractive to democracy, illegal, and inevitably result in gross violations of human rights be it during the staging of the coup or in the incumbency of the coup regimes. There is also a likelihood that continued absence of political order thus leading to perpetual instability foments the recurrence of *coups d’état* witnessed in many countries as, arguably, *coups d’état* sire other *coups d’état*. Further, coups inevitably set the stage for human rights violations among other things.

On a global scale, Africa has had a disproportionately high prevalence of *coups d’état* than other continents. Geographically, the *coups d’état* are unevenly distributed across Africa, with half of the total *coups d’état* between 1950 and 2017 being in West Africa. The distribution of *coups d’état* has also varied temporally. There has however been a notable decline in *coups d’état* per decade in Africa since 1980. It is worth noting that the African countries with the highest prevalence of *coups d’état* are generally in close proximity with each other. Further, most *coups d’état* have been witnessed in older African states by date of independence. It is ultimately worth noting that *coups d’état* globally have occurred in mostly marginalized, underdeveloped and low-income states. Arguably this description matches most African states. As far as Africa is concerned, the conditions that have historically resulted in *coups d’état* remain extant. Africa, therefore, remains susceptible to *coups d’état*.

Considering the place and function of the principle of state sovereignty at international law, a *prima facie* argument to the effect that international law does not proscribe *coups d’état* can be made. It, therefore, follows that there is no express proscription of *coups d’état* by international conventions/ treaties. It has however been noted that the recognition given to the notion of democracy by some treaties/conventions such as UDHR, CEDAW, and ICCPR, may arguably amount to an implicit proscription of *coups d’état* under international law. This

⁷ Luttwak op cit note 4.

⁸ Fundikila Wazambi ‘Military Coup D’état against Democratically Elected Governments in Africa and International Law: The Recent Cases of Mali and Egypt’ (2015) 9.

⁹ Monty G. Marshall and Donna Ramsey Marshall ‘Coups d’état Events, 1946-2017 Codebook’ (2018) *Center for Systemic Peace* at 1.

¹⁰ See Jonathan Powell ‘Determinants of the Attempting and Outcome of Coups d’état’ (2012) 6 *The Journal of Conflict Resolution* 46 at 1017-1040.

recognition, along with state practice as evidenced by UNGA and UNSC resolutions among other things, points towards a Customary International Law recognition of democracy as a general principle, along with a customary international law proscription of *coups d'état*. Further, In light of this research's focus on Africa, while a generalised assessment of the OAU/AU's position on *coups d'état* points towards an inconsistent approach, a shift is however discernible in the approaches of the OAU (pre 2002) and the AU (post the OAU era), with the OAU exercising restraint on internal matters of states thus making *coups d'état* a common means of governmental change, while there is a pattern of rejecting *coups d'état* in the AU era, albeit not entirely consistent. This also arguably points towards a 'local custom' proscription of *coups d'état* as far as Africa is concerned. Such 'local custom' is of paramount importance in ascertaining the customary international law on *coups d'état* in line with the SAS doctrine as it has also been established that Africa has historically experienced a disproportionate number of *coups d'état* globally thus making African states 'specially affected'. Following from this, such local custom of rejecting *coups d'état*, coupled with the widespread rejection of *coups d'état*, amounts to customary international law against *coups d'état*. It can thus be argued that Africa has led the way in the development of a customary proscription of *coups d'état* under international law. It must also be noted that *coups d'état* do amount to wrongful acts at international law regardless of it being difficult to attribute them to a state thus making it impossible for state responsibility to ensue. Further, under international law, democracy has since evolved into a right, the derogation of which warrants condemnation from the community of states.

II. RECOMMENDATIONS

This dissertation alluded to the existence of customary international law proscribing *coups d'état*. It also acknowledged that there has been a notable decline in the prevalence of *coups d'état* in Africa, suggesting that this trend is evidence of the increase in the prominence of state practice condemning *coups d'état*. Notwithstanding this downward trend, the dissertation however conceded that the customary international law rejecting *coups d'état* has not managed to completely do away with the prevalence of *coups d'état* in Africa. This has been attributed to the uncertainty of the customary international law, stemming from its unwritten nature. Further, the factors and circumstances believed to have traditionally fomented *coups d'état* in Africa remain extant thus African states remaining susceptible to *coups d'état*. These factors include exceedingly high military spending, the colonial legacy, diversity and the existence of

a single dominant ethnic group, among other factors. Following from this, the dissertation conceded that the effectiveness of customary international law is inherently limited. This means that the solution thereof cannot solely emerge from within the realm of international law.

Turning back to certainty concerns emanating from the uncodified nature of customary international law, the dissertation accepts that this, among other things, can sometimes be linked to the inconsistency in the response and treatment of *coups d'état* and coup regimes respectively. This, therefore, calls for a firm and concise legal instrument immune to such curtailment. It, therefore, follows that this dissertation reiterates the calls for a UN treaty specifically directed at warding off *coups d'état*.¹¹ This would be key as international conventions/ treaties are arguably the most frequent and specific conduits through which rules under international law are created¹² and, they do away with the uncertainty that typically plagues customary international law. The treaty need not necessarily forge new rules on *coups d'état*. It can merely be a codification of what are perceived to be the rules per customary international law. Keeping in mind that treaties typically solely bind their signatories, this dissertation submits that such a treaty is likely to succeed and be widely accepted given the already existent state practice of rejecting *coups d'état*. Arguably, it is also likely to attract many incumbent regimes seeking to shield themselves from the scourge of *coups d'état* as signatories.

¹¹ See Siegfried Pausewang 'A UN Convention to Ward Off *Coups d'Etat*?' (1992) 23 *Bulletin of Peace Proposals* 1 67-70.

¹² Malcolm N Shaw *International Law* (1986) at 77 -81.

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